THE CENTRAL LAW JOURNAL

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, FEBRUARY 26, 1875. { Hon. JOHN F. DILLON, Contributing Editor.

AN IMPORTANT DECISION IN BANKRUPTCY.—We print elsewhere a very important decision of Mr. District Judge Treat of the United States District Court for the Eastern District of Missouri, in the case of Singer, Assignee of Towle v. Sloan. It will be seen that the questions passed upon are similar to those in Hamlin v. Pettibone, 1 CENT. L. J. 404, and Browne v. McCracken, 7 Chi. Leg. N. 10; but the learned judge arrives at different conclusions from those reached in those cases, by a process of reasoning forcible, and, to our mind, satisfactory. These conclusions briefly stated, are (1) that the amendment of 1874, by which the words "knowing" and "knew," were interpolated into sections 35 and 39 of the original act, relate back to the 31st of December, 1873; and (2) that these words are in fact, and in law, of a different and stronger import than the words, "reasonable cause to believe," in the original act. We may add that these conclusions were not hastily reached. The same questions have been before the court in previous cases; and the learned Judge has been heretofore inclined in opinion with Judge Hopkins, in Hamlin v. Pettibone, and Judge Deady in Brooke v. McCracken; but, after fuller argument and more mature deliberation, he has reached the results here presented.

As we did not publish Brooke v. McCracken at the time the opinion was delivered, because it had been published in several other law journals when we received it; and as the interest in the questions therein discussed will be revived by the opinion of Judge Treat, we append it as a foot-note to his opinion.

Another Good Sign.

One of the most encouraging signs of a return to an era of pure and sound statesmanship in our national and state affairs, is the disposition evinced by the people to cast off the old party hacks, and to substitute in their stead jurists of eminent abilities and unsullied character. We have had occasion to note the election of Judge Bedle, one of the judges of the Supreme Court of New Jersey, to the office of governor of that state, and how the people of Vermont bestowed a similar honor on their Chief Justice Peck. We were also surprised and gratified a few days since by the election of Judge Christiancy, of the Supreme Court of Michigan, to the senate of the United States; and it is with no less pleasure that we see a similar honor falling upon Hon. S. J. R. McMillan, chief justice of the Supreme Court of Minnesota. This feeling we entertain irrespective of any consideration of the political opinions of the eminent jurists we have named. We do not know or care what Judge McMillan's political views are. We know that he is an able judge and an upright man, whose name will not be sullied by connection with corrupt political jobs, and who will never consent, through motives of temporary party expediency, to the breaking down of the boundaries which separate the jurisdiction of the general goverment from that of the states. A great jurist may find an opportunity to perform in the council chamber, services more conspicuous than could occur from a life-time of toil on the judicial bench. After Sir Edward Coke had been degraded from the office of Chief Justice of England, had been imprisoned in the tower, and had been further degraded by being compelled to serve as sheriff of Buckinghamshire, he was elected by his admiring countrymen to the house of commons; and there, in his old age, he framed and carried through the Petition of Right, or second Magna Charta—a service which entitles him to undying gratitude wherever the English language is spoken, and wherever liberty has a name. Not in all his writings, nor in his eminent judicial career—not even when he dared to tell the King that he (the King), "had no prerogative but that which the law of the land allowed him," did he perform a service so conspicuous and of such enduring benefit to mankind.

The Arkansas Question.

We reprint elsewhere from our able cotemporary the Financier, a well written article giving a brief resume of the events which have led to the establishment of the present state government of Arkansas, and illustrating the position taken by the President in his recent message to the Senate. Whilst we do this, we firmly disclaim any intention of introducing into our columns anything that savors of party politics. In our judgment, the question whether the President of the United States can set up and tear down state governments at pleasure, entirely transcends all party questions; and it would be a shame if an American law journal should hesitate to discuss the most important *legal* question that was ever presented to the American people.

While the Louisiana question was before the country we expressed the opinion, in accordance with the views of Mr. Charles O'Conor and Mr. George T. Curtis, but against those of Mr. Reverdy Johnson and Mr. Jeremiah Black, that, *pendente lite*, the president has power to reconsider and reverse an erroneous decision he may have made in recognizing one of two contestants as governor of a state. We still adhere to that opinion. But while we conceive that the President had jurisdiction to do this in the Arkansas case, upon satisfactory evidence, while the contest between Brooks and Baxter was pending, (could such evidence have been adduced), yet, now that that contest has closed by the withdrawal of one of the parties; now that a constitutional convention has intervened; now that a new constitution has been adopted by an overwhelming vote of the people, and a new state government established, and a new governor elected by a like majority,—to suppose that the general government has jurisdiction to interfere and resurrect the old government thus decisively repudiated, is, in our judgment, the most alarming proposition which ever foreshadowed evil to our institutions. If the general government can interfere and set aside a constitution of a state on the ground that it was irregularly established and in disregard of the rights of *minorities* (see the President's language), it can set aside the governments under which several of the states are now working. But we forbear to protract the discussion of a question as to which intelligent lawyers cannot differ in opinion.

Spanish Land Titles—Proposal to Change the Rules of Evidence.

We desire to call the attention of the profession to the following bill which has been introduced into the Missouri legislature:

AN ACT to quiet titles to land and to prevent vexatious litigation by admitting as evidence in courts the sworn statements of witnesses as to old possessions and cultivations.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. That the testimony of French, Spanish and other witnesses, as appears in writing in the minutes and entries of the board of commissioners and recorder of land titles of the United States, in the district of Louisiana territory and the state of Missouri, while acting under the act of Congress of the 2d of March, 1805, chapter 26, page 324; of the 21st day of April, 1806, chapter 39, page 391; of the 3d of March, 1807, chapter 36, page 440; of the 13th of June, 1812, chapter 99, page 748; of the 13th March, 1813, chapter 44, page 812, of volume 2 of the Public Statutes at Large of the United States of America, and the act of April 14, 1814, chapter 52, page 121, volume 3 of said statutes, and also under the acts of Congress of May 26, 1824, chapter 184, page 65, and of July 9, 1832, chapter 180, page 565, volume 4 of said statutes, shall be admissible as *prima facie* evidence in all the courts of justice in the state of Missouri, in any suits pending therein on the production of a certified copy of such minutes or entries from the recorder of land titles of the United States, in Missouri, or from the commissioner of the general land office of Washington, or from any other officer in this state having charge or custody of said minutes of testimony. *Provided*, however, that such testimony so certified shall be admitted only in evidence on the part or behalf of any defendant in any suit for the recovery of real estate in this state, who has by himself or those under or through whom he claimed title or possession held possession of the real estate sued for, or any part thereof, for a period of ten years consecutively next preceding the commencement of such suit, and whenever a defendant elects to introduce such evidence the plaintiff shall have equal rights under this act.

Sec. 2. This act to take effect and be in force from and after its passage.

Our own information in regard to Spanish land titles does not qualify us to express an opinion upon the propriety of this measure; but much light has been thrown upon it in the columns of the St. Louis Republican of the 18th instant, by a legal gentleman, who is evidently thoroughly acquainted with the subject; and this correspondent has harped our fear aright. If his statements are correct, this measure, instead of being one to "quiet titles," is simply a lawyer's trick, designed to subserve the purposes of the defendants in certain suits *now pending* in the courts of St. Louis. These defendants' appear to be heirs of land-grabbers, who, without a shadow of right, fenced up other peoples' land and have for years held possession of it against the lawful owners and their heirs. In their interest, and in "suits pending," this measure proposes to repeal one of the most necessary and vital rules of evidence which obtains in courts of justice—one which has been recognized again and again by the courts of Missouri, and by the Supreme Court of the United States,—and to admit, not in favor of *adverse* possessors, but in favor of *possessors* merely, the *ex parte*, and in many cases, no doubt, the false testimony of witnesses taken before land commissioners two generations ago. It is no palliation of this cunning scheme that this evidence is to be *prima facie* only; for after such a lapse of time what testimony can be adduced to contradict it? Unless we have been greatly deceived, the passage of this bill would be a gross outrage on public justice.

Corporal Punishment for Wife Beating.

The English Home Secretary has recently taken measures to ascertain the views of the chairmen of the various courts of quarter sessions as to the advisability of extending the administration of corporal punishment. The opinions thus elicited are conflicting; but there seems to be quite a strong sentiment in favor of extending this punishment to the offence of wife-beating.

The manner in which incorrigible wife-beaters are dealt with in our police courts has been frequently under our personal observation; and the conviction has, at times, been almost forced upon us that the abolition of corporal punishment in case of wife-beaters has been a mistake. The way in which the present system works is generally this: A drunken wretch is arraigned in the police court for beating his wife, and is found guilty and sentenced to pay a fine. This the miserable wife pays out of her hard earnings when she can, and he is released. If she or he is unable to pay it, he is committed to the work-house, or where there is no work-house, to the chain-gang or rock-pile, to work out his fine at a small sum each day. The work which he thus performs is of very little benefit to the public, and none to his family, who are thus deprived of the wages which he might earn if released.

At the Newcastle (English) quarter sessions, when this subject was up for consideration, Mr. Digby Seymour, Q. C., expressed himself in favor of inflicting a heavy term of imprisonment on the criminal, of requiring him to work in prison, and of devoting the proceeds of his labor to the expense of maintaining his wife. It is needless to say that this could not be done in this country without great loss to the public. The American states have found it very difficult to make their penitentiaries self-sustaining through convict labor, to say nothing of paying for such labor. The alternative then lies between depriving the family of money necessary for its support through a fine, or depriving it of the benefit of the husband's labor through imprisonment—and flogging. The last expedient seems to afford a direct and efficient way out of the difficulty; and the only objection to it is that it is a practice injurious to the public morals. But right here it is just possible that neither our country, nor the age in which we live, has monopolized all the civilization there is, and that we have grown a little too sentimental on this question.

We knew an industrious shoe-maker, who, as a general rule, got drunk and beat his wife every Saturday night, and she regularly paid his fine. This practice was kept up for years. Now this fellow was a type of many; and we are satisfied that two or three good floggings, with an assurance that each offence would be visited by a like punishment, would have cured his otherwise incorrigible habit and saved his miserable wife much pecuniary loss.

To the credit of our countrymen we will say that we never knew an American wife-beater; but then our experience has not been very extensive.

The Appellate Jurisdiction of the Supreme Court of the United States over the Final Judgments and Decrees of the State Courts.

We commence in this number the publication of the opinion of the Supreme Court of the United States on this subject, recently delivered by Mr. Justice Miller, and will conclude it in our next. The opinion is an unusually long one for Judge Miller, who is not given to amplification, but in reality it is, considering the momentous question the court had to determine for the first time under the act of

1867, the doubtful intent of Congress, the arguments it presents, and the objections it answers, brought within the smallest desirable compass. With possibly one exception—the Iola and Topeka tax cases—this is the most important case which has thus far come before the court at its present session. It was thoroughly argued by the best lawyers in the country, and maturely considered by the court. It was contended by Judge Curtis and Mr. Phillips, that under the constitution, the effect of the act of 1867 was to bring under the appellate jurisdiction of the supreme court every case decided by the highest court of a state, which presented one of the enumerated *federal* questions (so-called for convenience), whether the decision of such question by the state court was right or wrong, and that the United States Supreme Court must thereupon go into the case on the merits—the whole merits—on the entire record. Such a change in the judicial polity of the government, such an enlargement of federal jurisdiction, involving as a practical effect, at the will of a litigant, subordination, *in all cases*, of the highest state courts to the Supreme Court of the United States, if it had been authoritatively determined to have been made, would doubtless have surprised the profession who have not personally supposed the act of 1867 had any such extended and far-reaching consequences. If the question were to be considered alone upon the language of the act of 1867, which omits the restrictive clause in the act of 1789, it must be admitted that there is difficulty in escaping the conclusion that if the federal questions were *erroneously* decided by the state court, the whole merits of the case, upon the entire record, must be gone into and decided by the supreme court. But when the surrounding circumstances and the consequences of such a holding are considered, which are adverted to by Mr. Justice Miller, the court would seem to be well justified in concluding that it would not do to impute to Congress, upon the doubtful language of the act of 1867, suceptible, as shown, of another interpretation, a purpose to make such a radical and revolutionary change in the relations between the state courts and the Supreme Court of the United States. But it is not our purpose to enter into the discussion of the question, but rather to call attention to the decision under consideration. We think it will command the assent of the profession as a *sound* exposition of the statute; at all events the intelligent reader will not fail to notice and admire the solid strength and logical force of the argumentation. Whoever wishes to obtain an accurate view of the relations of the state and federal courts, cannot do better than to give to this opinion careful study. It is to be regretted, in a case of such vast importance, that a full bench did not take part in its consideration; but this was not possible, as the chief justice did not hear the argument.

Jurisdiction of the Supreme Court of the United States over the State Courts.

THOMAS MURDOCK v. THE MAYOR AND ALDERMEN OF MEMPHIS *ET AL.*

Supreme Court of the United States No. 4, October Term, 1874.

1. **Removal of Causes from State to Federal Courts—What Statute Governs.**—The second section of the act of July 5, 1867, 14 U. S. Statutes, 385, operates as a repeal of the twenty-fifth section of the judiciary act of 1789; and the act of 1867, as it is now found in the revised statutes, is the sole law governing the removal of causes from state courts to this court for review, and has been since its enactment in 1867.

2. ——. **Jurisdiction of Supreme Court there under Limited to Federal Questions.**—Congress did not ntend, by omitting in this statute the restrictive clause of the act of 1789, limiting the supreme court to the consideration of federal questions in cases so removed, to enact affirmatively that the court *should* consider all other questions involved in the case that might be necessary to a final judgment or decree.

3. ——. ——. Nor does the language of the statute, that the judgment may be re-examined and reversed or affirmed on a writ of error * * in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States, require the examination of any other than questions of federal law.

4. ——. ——. The phrase here used has reference to the manner of issuing the writ, its return with the record of the case, its effect in removing the case to this court, and the general rules of practice which govern the progress of such cases to final judgment, and is it not intended to prescribe the considerations which should govern this court in forming that judgment.

5 ——. ——. But the language of the statute in making the jurisdiction of this court dependent on the decision of certain questions by the state court against the right set up under federal law or authority, conveys the strongest implication that these questions alone are to be considered when the case is brought here for revision.

6. ——. ——. This view is confirmed by the course of decisions in this court for eighty years, by the policy of Congress, as shown in numerous statutes, conferring the jurisdiction of this class of cases on courts of original jurisdiction, viz., the district and circuit courts, whether originally or by removal from state courts, when it intends the whole case to be tried, and by the manifest purpose which caused the passage of the law.

7. ——. **Construction of these Statutes—Opinions of State Courts.**—In construing the present statute as compared with the act of 1789, we are of opinion that we are not so closely restricted to the face of the record in determining whether one of the questions mentioned in it has been decided in the state court, and that we may under this statute look to the properly certified opinion of the state courts when any have been delivered in the case.

8. ——. **Grounds on which the Supreme Court will Exercise its Jurisdiction.**—And we hold the following propositions as governing our examination and our judgments and decrees in this class of cases, under the statute as now found in the recent revision of the acts of Congress:

(1.) That it is essential to the jurisdiction of this court over the judgment or decree of a state court, that it shall appear that one of the questions mentioned in the statute must have been raised and presented to the state court, that it must have been decided by the state court against the right claimed or asserted by plaintiff in error, under the constitution, treaties, laws, or authority of the United States, or that such a decision was necessary to the judgment or decree rendered in the case.

(2.) These things appearing, this court has jurisdiction, and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the state court.

(3.) If it finds that it was rightly decided, the judgment must be affirmed.

(4.) If it was erroneously decided, then the court must further enquire whether there is any other matter or issue adjudged by the state court sufficiently broad to maintain the judgment, notwithstanding the error in the decision of the federal question. If this be found to be the case, the judgment must be affirmed without examination into the soundness of the decision of such other matter or issue.

(5.) But if it be found that the issue raised by the question of federal law must control the whole case, or that there has been no decision by the state court of any other matter which is sufficient of itself to maintain the judgment, then this court will reverse that judgment, and will either render such judgment here as the state court should have rendered, or will remand the case to that court for further proceedings, as the circumstances of the case may require.

9. ——. **The Result.**—These principles applied to the present case show that we have jurisdiction of it, and that the judgment of the state court must be affirmed.

In error to the Supreme Court of Tennessee.

Mr. Justice MILLER delivered the opinion of the court.

In the year 1867 Congress passed an act, approved February 5th, entitled an act to amend "An act to establish the judicial courts of the United States, approved September twenty-fourth, seventeen hundred and eighty-nine." See 14 United States Statutes, 385. This act consisted of two sections, the first of which conferred upon the federal courts, and upon the judges of those courts, additional power in regard to writs of *habeas corpus*, and regulated appeals and other proceedings in that class of cases. The second section was a reproduction, with some changes, of the twenty-fifth section of the act of 1789, to which, by its title, the act of 1867 was an amendment, and it related to the appellate jurisdiction of this court over judgments and decrees of state courts.

The difference between the twenty-fifth section of the act of 1789 and the second section of the act of 1867 did not attract much attention, if any, for some time after the passage of the latter. Occasional allusions to its effect upon the principles long established by this court under the former, began at length to make their appearance, in the briefs and oral arguments of counsel, but were

not found to be so important as to require any decision of this court on the subject.

But in several cases, argued within the last two or three years, the proposition has been urged upon the court that the latter act worked a total repeal of the twenty-fifth section of the former, and introduced a rule for the action of this court in the class of cases to which they both referred, of such extended operation and so varient from that which had governed it heretofore, that the subject received the serious consideration of the court. It will at once be perceived that the question raised was entitled to the most careful examination, and to all the wisdom and learning, and the exercise of the best judgment which the court could bring to bear upon its solution, when it is fairly stated.

The proposition is, that by a fair construction of the act of 1867 this court must, when it obtains jurisdiction of a case decided in a state court, by reason of one of the questions stated in the act, proceed to decide every other question which the case presents, which may be found necessary to a final judgment on the whole merits. To this has been added the further suggestion that in determining whether the question on which the jurisdiction of this court depends, has been raised in any given case, we are not limited to the record which comes to us from the state court—the record proper of the case as understood at common law—but we may resort to any such method of ascertaining what was really done in the state court as this court may think proper, even to *ex-parte* affidavits.

When the case, standing at the head of this opinion, came on to be argued, it was insisted by counsel for defendants in error, that none of the questions were involved in the case necessary to give jurisdiction to this court, either under the act of 1789 or of 1867, and that if they were, there were other questions, exclusively of state court cognizance, which were sufficient to dispose of the case, and that, therefore, the writ of error should be dismissed.

Counsel for plaintiffs in error, on the other hand, argued that not only was there a question in the case decided against them, which authorized the writ of error from this court under either act, but that this court, having for this reason obtained jurisdiction of the case, should re-examine all the questions found in the record, though some of them might be questions of general common law or equity, or raised by state statutes, unaffected by any principle of federal law, constitutional or otherwise.

When, after argument, the court came to consider the case in consultation, it was found that it could not be disposed of without ignoring or deciding some of these propositions, and it became apparent that the time had arrived when the court must decide upon the effect of the act of 1867 on the jurisdiction of this court, as it had been supposed to be established by the twenty-fifth section of the act of 1789.

That we might have all the aid which could be had from discussion of counsel, the court ordered a reargument of the case on three distinct questions which it propounded, and invited argument, both oral and written, from any counsel interested in them. This reargument was had, and the court was fortunate in obtaining the assistance of very eminent and very able jurists. The importance of the proposition under discussion justified us in delaying a decision until the present term, giving the judges the benefit of ample time for its most mature examination.

With all the aid we have had from counsel, and with the fullest consideration we have been able to give the subject, we are free to confess that its difficulties are many and embarrassing, and in the results we are about to announce, we have not been able to arrive at entire harmony of opinion.

The questions propounded by the court for discussion by counsel were these:

1. Does the second section of the act of Feb. 5, 1867, repeal all, or any part, of the 25th section of the act of 1789, commonly called the judiciary act?

2. Is it the true intent and meaning of the act of 1867, above referred to, that when this court has jurisdiction of a case, by reason of any of the questions therein mentioned, it shall proceed to decide all the questions presented by the record, which are necessary to a final judgment or the decree?

3. If this question be answered affirmatively, does the constitution of the United States authorize Congress to confer such a jurisdiction on this court?

1. The act of 1867 has no repealing clause nor any express words of repeal. If there is any repeal, therefore, it is one of implication. The differences between the two sections are of two classes, namely, the change or substitution of a few words or phrases in the latter for those used in the former, with very slight, if any, change of meaning, and the omission, in the latter, of two important provisions found in the former. It will be perceived by this statement that there is no repeal by positive new enactments inconsistent in terms with the old law. It is the words that are wholly omitted in the new statute which constitute the important feature in the question thus propounded for discussion.

For the purpose of easy comparison and ready ascertainment of these changes the 25th section of the act of 1789, and the 2d section of the act of 1867 are here given verbatim in parallel columns:

The 25th section of the act of 1789.

That a final judgment or decree in any suit, in the highest court *of law or equity* of state in which a decision in the suit could be had, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their validity, *or where is drawn in question the construction of any clause* of the constitution, or of a treaty or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or *exemption* specially set up or claimed by either party under such clause of the said constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a *circuit court*, and the proceeding upon the reversal shall also be the same except that the Supreme Court, *instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid*

The 2d section of the act of 1867.

That a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their validity, or where any title, right, privilege, or *immunity is claimed under the* constitution, or any treaty or statute of, or commission held, or *authority exercised*, under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission, or *authority*, may be re examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error, the citation being signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner, and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed *in a court of the United States*, and the proceeding upon the reversal shall also be the same *except that the Supreme Court may, at their discretion, proceed to a final decision of the same, and award execution or remand the same to an inferior court.*

than such as appears on the face of the record and immediately respects the before-mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

A careful comparison of these two sections can leave no doubt that it was the intention of Congress, by the latter statute, to revise the entire matter to which they both had reference, to make such changes in the law as it stood as they thought best, and to substitute their will in that regard, entirely for the old law upon the subject. We are of opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law, embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself, and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform. United States v. Tynen, 11 Wall. 88; Henderson Tobacco, Id., 652; Bartlett v. King, 12 Mass. 557; Cincinnati v. Cody, 10 Pick. 36; Sedgwick on Statutes, 126.

The result of this reasoning is that the 25th section of the act of 1789 is technically repealed, and that the second section of the act of 1867 has taken its place. What of the statute of 1789 is embraced in that of 1867 is, of course, the law now, and has been ever since it was first made so. What it changed or modified is the law as thus changed or modified. That which is omitted ceased to have any effect from the day that the substituted statute was approved.

This view is strongly supported by the consideration that the revision of the laws of Congress passed at the last session, based upon the idea that no change in the existing law should be made, has incorporated with the revised statutes nothing but the second section of the act of 1867. Whatever might have been our abstract views of the effect of the act of 1867, we are, as to all future cases, bound by the law as found in the revised statutes by the express language of Congress on that subject; and it would be labor lost to consider any other view of the question.

2. The affirmative of the second question propounded above is founded upon the effect of the omission or repeal of the last sentence of the 25th section of the act of 1789. That clause in express terms limited the power of the supreme court in reversing the judgment of a state court, to errors apparent on the face of the record, and which respected questions, that for the sake of brevity, though not with strict verbal accuracy, we shall call federal questions, namely, those in regard to the validity or construction of the constitution, treaties, statutes, commissions or authority of the federal government.

The argument may be thus stated: 1. That the constitution declares that the judicial power of the United States shall extend to *cases* of a character which includes the questions described in the section, and that by the word *case*, is to be understood all of the case in which such a question arises. 2. That by the fair construction of the act of 1789 in regard to removing those cases to this court, the power and the duty of re-examining the whole case would have been devolved on the court, but for the restriction of the clause omitted in the act of 1867; and that the same language is used in the latter act regulating the removal, but omitting the restrictive clause. And, 3. That by re-enacting the statute in the same terms as to the removal of cases from the state courts, without the restrictive clause, Congress is to be understood as conferring the power which that clause prohibited.

We will consider the last proposition first.

What were the precise motives which induced the omission of this clause it is impossible to ascertain with any degree of satisfaction. In a legislative body like Congress, it is reasonable to suppose that among those who considered this matter at all, there were varying reasons for consenting to the change. No doubt there were those who, believing that the constitution gave no right to the federal judiciary to go beyond the line marked by the omitted clause, thought its presence or absence immaterial; and in a revision of the statute it was wise to leave it out, because its presence implied that such a power was within the competency of Congress to bestow. There were, also, no doubt, those who believed that the section, standing without that clause, did not confer the power which it prohibited, and that it was, therefore, better omitted. It may also have been within the thought of a few that all that is now claimed would follow the repeal of the clause. But if Congress, or the framers of the bill, had a clear purpose to enact affirmatively that the court *should consider* the class of errors which that clause forbid, nothing hindered that they should say so in positive terms; and in reversing the policy of the government from its foundation in one of the most important subjects on which that body could act, it is reasonably to be expected that Congress would use plain, unmistakable language in giving expression to such intention.

There is, therefore, no sufficient reason for holding that Congress, by repealing or omitting this restrictive clause, intended to enact affirmatively the thing which that clause had prohibited.

We are thus brought to the examination of the section as it was passed by the Congress of 1867, and as it now stands, as part of the Revised Statutes of the United States.

Before we proceed to any criticism of the language of the section, it may be as well to revert for a moment to the constitutional provisions which are supposed to, and which do, bear upon the subject. The second section of the third article already adverted to, declares that "the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made, under their authority."

Waiving for the present the question whether the power thus conferred extends to all questions, in all cases, where only one of the questions involved arises under the constitution or laws of the United States, we find that this judicial power is by the constitution vested in one supreme court and in such inferior courts as Congress may establish. Of these courts the constitution defines the jurisdiction of none but the supreme court. Of that court it is said, after giving it a very limited original jurisdiction, that "in all other cases before mentioned, the supreme court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress may prescribe."

This latter clause has been the subject of construction in this court many times, and the uniform and established doctrine is, that Congress having by the act of 1789, defined and regulated this jurisdiction in certain classes of cases, this affirmative expression of the will of that body is to be taken as excepting all other cases to which the judicial power of the United States extends, than those enumerated. Wiscart v. Dauchy, 3 Dallas, 321; Durousseau v. United States, 6 Cranch, 307; The Lucy, 6 Wallace, 318; *Ex parte* McCardle, 7 Wallace, 506.

It is also to be remembered that the exercise of judicial power over cases arising under the constitution, laws and treaties of the United States, may be original as well as appellate, and may be conferred by Congress on other courts than the supreme court, as it has done in several classes of cases which will be hereafter referred to. We are under no necessity, then, of supposing that Congress, in the section we are considering, intended to confer on the supreme court the whole power which, by the constitution, it was competent for Congress to confer in the class of cases embraced in that section.

Omitting for the moment that part of the section which characterizes the questions necessary to the jurisdiction conferred, the enactment is, that a final judgment or decree in any suit in the highest court of a state in which a decision in the suit can be had (when one of these questions is decided), may be re-examined, and reversed or affirmed, in the Supreme Court of the United

States, upon a writ of error. * * in the same manner, and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been passed or rendered in a court of the United States.

It is strenuously maintained that as the office of a writ of error at the common law, and as it is used in relation to the inferior courts of the United States, when issued from this court, is to remove the whole case to this court for revision upon its merits, or at least upon all the errors found in the record of the case so removed, and as this statute enacts that these cases shall be re-examined in the same manner, and under the same regulations, and the writ shall have the same effect as in those cases, therefore, *all* the errors found in a record so removed from a *state* court must be reviewed so far as they are essential to a correct final judgment on the whole case.

The proposition as thus stated has great force, and is entitled to our most careful consideration. If the invariable effect of a writ of error to a Circuit Court of the United States, is to require of this court to examine and pass upon all the errors of the inferior court, and if re-examination of the judgment of the court in the same manner and under the same regulations, means that in the re-examination every thing is to be considered which could be considered in a writ to the circuit court, and nothing else, then the inference which is drawn from these premises would seem to be correct.

But let us consider this.

There are two principal methods known to English jurisprudence, and to the jurisprudence of the federal courts, by which cases may be removed from an inferior to an appellate court for review. These are the writ of error and the appeal. There may be, and there are, other exceptional modes, such as the writ of *certiorari* at common law, and a certificate of division of opinion under the acts of Congress. The appeal, which is the only mode by which a decree in chancery or in admiralty can be brought from an inferior federal court to this court, *does* bring up the whole case for re-examination on all the merits, whether of law or fact, and for consideration on these, as though no decree had ever been rendered. The writ of error is used to bring up for review all other cases, and when thus brought here the cases are *not* open for re-examination on their whole merits, but every controverted question of fact is excluded from consideration, and only such errors as this court can see that the inferior court committed, and not all of these can be the subject of this court's corrective power.

Now, one of the first things apparent on the face of this statute, is, that decrees in chancery, and in admiralty also, if a state court shall entertain jurisdiction of a case essentially of admiralty cognizance, are to be removed into this court from the state courts by this writ of error as well as judgments at law. And such has been the unquestioned practice under the act of 1789 from its passage until now. But this writ cannot bring a decree in chancery or admiralty from the circuit court to this court for review. It has no such effect, and we dismiss every day cases brought here by writ of error to a circuit court, because they can only be brought here by appeal, and the writ of error does not extend to them. The San Pedro, 2 Wheaton, 132; McCollins v. Enger, 2 How. 61; Minor v. Tillotson, Ibid. 392; Benton v. Lapier, 22 H. 118.

Unless, therefore, we have been wholly wrong for eighty years under the act of 1789, and unless we are prepared to exclude chancery cases decided in the state courts from the effect of this writ, it cannot, literally, have the same effect as in cases from a court of the United States, and if we could hold that the writ would have the same effect in removing the case, which is probably all that is meant, still the case when removed cannot literally be examined in the same manner, if by manner is meant the principle on which the judgment of the court must rest. For chancery cases, when brought here from the circuit courts, are brought for a trial *de novo* on all the evidence and pleadings in the case.

It is therefore too obvious to need comment, that this statute was designed to bring equity suits to this court from the state courts by writ of error, as well as law cases, and that it was not intended that they should be re-examined in the same manner as if brought here from a court of the United States, in the sense of the proposition we are considering.

But passing from this consideration, what has been the manner in which this court re-examines the judgments of the circuit courts on writs of error, as touching the errors into which it will look for reversal? For it is this *manner* which is supposed to require an examination of all errors, whether of federal law or otherwise under this statute. It requires but slight examination of the reports of the decisions, or familiarity with the practice of this court, to know that it does not examine into or decide all the errors, or matters assigned for error, of the most of the cases before them. Many of these are found to be immaterial, the case being reversed or affirmed on some important point which requires of itself a judgment without regard to other matters. There are errors also which may be sufficiently manifest of which the appellate court has no jurisdiction, as in regard to a motion for a new trial, or to quash an indictment, or for a continuance, or amendment of pleadings, or some other matter, which, however important to the merits of the case, is within the exclusive discretion of the inferior court.

Nor does it seem to us that the phrase, "in the same manner and under the same regulations, and the writ shall have the same effect," is intended to furnish the rule by which the court shall be guided in the considerations which should enter into the judgment that it shall render. That the writ of error shall have the same effect as if directed to a circuit court, can mean no more than that it shall transfer the case to the supreme court, and with it the record of the proceedings in the court below. This is the effect of the writ and its function and purpose. When the court comes to consider the case, it may be limited by the nature of the writ, but what it shall review, and what it shall not, must depend upon the jurisdiction of the court in that class of cases as fixed by the law governing that jurisdiction.

So the regulations here spoken of are manifestly the rules under which the writ is issued, served, and returned; the notice to be given to the adverse party, and time fixed for appearance, argument, etc. Another important effect of the writ and of the regulations governing it, is, that when accompanied by a proper bond, given and approved within the prescribed time, it operates as a supersedeas to further proceedings in the inferior court. The word manner also much more appropriately expresses the general mode of proceeding with the case, after the writ has been allowed, the means by which the exigency of the writ is enforced, as by rule on the clerk, or mandamus to the court, and the progress of the case in the appellate court; as filing the record, docketing the case, time of hearing, order of the argument, and such other matters as are merely incident to final decision by the court. In short, the whole phrase is one eminently appropriate to the expression of the idea that these cases, though coming from state, instead of federal tribunals, shall be conducted in their progress through the court, in the matter of the general course of procedure, by the same rules of practice that prevail in cases brought under writs of error to the courts of the United States.

This is a different thing, however, from laying down rules of decision, or enacting the fundamental principles on which the court must decide this class of cases. It differs widely from an attempt to say that the court, in coming to a judgment, must consider this matter and disregard that. It is by no means the language in which a legislative body would undertake to establish the principles on which a court of last resort must form its judgment.

There is an instance of the use of very similar language by Congress in reference to the removal of causes into this court for review, which has uniformly received the construction which we now place upon this.

By the judiciary act of 1789, there was no *appeal* in the judicial sense of that word, to this court in any case. Decrees in suits in equity and admiralty were brought up by writ of error only, until the act of 1803; and as this writ could not bring up a case to be tried on its controverted questions of fact, the 19th section of the act of 1789 required the inferior courts to make a finding of facts which should be accepted as true by the appellate court. But by the act of March 3, 1803, 2 U. S. Statutes, 244, these cases were to be brought to this court by appeal, and to give this appeal full effect, the 19th section of the act of 1789 was repealed, and upon such appeal, the court below was directed to send to this court all the pleadings, depositions, testimony and proceedings. In this manner the court obtained that full possession and control of the case which the nature of an appeal implies. And it is worthy of observation that Congress did not rely upon the mere legal operation of the word appeal to effect this, but provided in express terms the means necessary to ensure this object.

But to avoid the necessity of many words as to the mode in which the case should be brought to this court, and conducted when here, it was enacted "that such appeals shall be subject to the same rules, regulations and restrictions as are prescribed in law, in case of writs of error." Here is language quite as strong as that we have had under consideration, and strikingly similar both in its purport and in the purpose to be served by it. Yet no one ever supposed that when the court came to consider the judgment which it should render on such an appeal, it was to be governed by the principles applicable to writs of error at common law. It never was thought, for a moment, notwithstanding the use of the word "restrictions," that the court was limited to questions of law apparent on the record; but the uniform course has been to consider it as a case to be tried *de novo* on all the considerations of law and of fact applicable to it. There are many decisions of this court showing that these words have been held to apply alone to the course of procedure, to matters of mere practice, and not at all affording a rule for decision of the case on its merits in the conference room. Villabolos v. United States, 6 How. 81; Castro v. United States, 3 Wall. 46; Mussina v. Cavasos, 6 Wall. 355.

There is, therefore, nothing in the language of the act, as far as we have criticised it, which in express terms defines the extent of the re-examination which this court shall give to such cases.

But we have not yet considered the most important part of the statute, namely, that which declares that it is only upon the existence of certain questions in the case, that this court can entertain jurisdiction at all. Nor is the mere existence of such a question in the case sufficient to give jurisdiction—the question must have been *decided* in the state court. Nor is it sufficient that such a question was raised and was decided. It must have been decided in a certain way, that is, against the right set up under the constitution, laws, treaties, or authority of the United States. The federal question may have been erroneously decided. It may be quite apparent to this court that a wrong construction has been given to the federal law, but if the right claimed under it by plaintiff in error has been conceded to him, this court cannot entertain jurisdiction of the case, so very careful is the statute, both of 1789 and of 1867, to narrow, to limit, and define the jurisdiction which this court exercises over the judgments of the state courts. Is it consistent, with this extreme caution, to suppose that Congress intended, when those cases came here, that this court should not only examine those questions, but all others found in the record?—questions of common law, of state statutes, of controverted facts, and conflicting evidence Or is it the more reasonable inference that Congress intended that the case should be brought here that *those questions* might be decided, and *finally* decided by the court established by the constitution of the Union, and the court which has always been supposed to be not only the most appropriate, but the only proper tribunal for their final decision? No such reason nor any necessity exists for the decision by this court of other questions in those cases. The jurisdiction has been exercised for nearly a century without serious inconvenience to the due administration of justice. The state courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise. And it is not lightly to be presumed that Congress acted upon a principle which implies a distrust of their integrity or of their ability to construe those laws correctly.

Let us look for a moment into the effect of the proposition contended for upon the cases as they come up for consideration in the conference room. If it is found that no such question is raised or decided in the court below, then all will concede that it must be dismissed for want of jurisdiction. But if it is found that the federal question was raised and was decided against the plaintiff in error, then the first duty of the court obviously is to determine whether it was correctly decided by the state court. Let us suppose that we find that the court below was right in its decision on that question. What, then, are we to do? Was it the intention of Congress to say that while you can only bring the case here on account of this question, yet when it is here, though it may turn out that the plaintiff in error was wrong on that question, and the judgment of the court below was right, though he has wrongfully dragged the defendant into this court by the allegation of an error which did not exist, and without which the case could not rightfully be here, he can still insist on an enquiry into all the other matters which were litigated in the case? This is neither reasonable nor just.

In such case both the nature of the jurisdiction conferred, and the nature and fitness of things demand, that no error being found in the matter which authorized the re-examination, the judgment of the state court should be affirmed, and the case remitted to that court for its further enforcement.

The whole argument we are combating, however, goes upon the assumption that when it is found that the record shows that one of the questions mentioned has been decided against the claim of the plaintiff in error, this court has jurisdiction, and that jurisdiction extends to the whole case. If it extends to the whole case, then the court must re-examine the whole case, and if it re-examines, it must decide the whole case. It is difficult to escape the logic of the argument if the first premise be conceded. But it is here the error lies. We are of opinion that upon a fair construction of the whole language of the section, the jurisdiction conferred is limited to the decision of the questions mentioned in the statute, and, as a necessary consequence of this, to the exercise of such powers as may be necessary to cause the judgment in that decision to be respected.

We will now advert to one or two considerations apart from the mere language of the statute, which seem to us to give additional force to this conclusion.

It has been many times decided by this court, on motions to dismiss this class of cases for want of jurisdiction, that if it appears from the record that the plaintiff in error raised, and presented to the court by pleadings, prayer for instruction, or other appropriate method, one of the questions specified in the statute, and the court ruled against him, the jurisdiction of this court attached, and we must hear the case on its merits. Rector v. Ashley, 6 Wall. 142; Bridge Proprietors v. Hoboken Co., 1 Wall. 116; Furman v. Nichol, 8 Wall. 44; Armstrong v. Treasurer, 16 Peters, 281; Crowell v. Randall, 10 Peters, 368. Heretofore these merits have been held to be to determine whether the propositions of law involved in the specific federal question were rightly decided, and if not, did the *case* of plaintiff in error, on the pleadings and evidence, come within the principle ruled by this court. This has always been held to be the exercise of the jurisdiction and re-examination of the case provided by the statute. But if when we once get jurisdiction, everything in the case is open to re-examin-

ation, it follows that every case tried in any state court, from that of a justice of the peace to the highest court of the state, may be brought to this court for final decision on all the points involved in it.

That this is no exaggeration let us look a moment.

Suppose a party is sued before a justice of the peace for assault and battery. He pleads that he was a deputy marshal of the United States, and in serving a warrant of arrest on plaintiff he gently laid his hands on him and used no more force than was necessary. He also pleads the general issue. We will suppose that to the special plea some response is made which finally leads to a decision against the defendant on that plea. And judgment is rendered against him on the general issue also. He never was a deputy marshal. He never had a writ from a United States court; but he insists on that plea through all the courts up to this, and when he gets here the record shows a federal question decided against him, and this court must re-examine the whole case, though there was not a particle of truth in his plea, and it was a mere device to get the case into this court. Very many cases are brought here now of that character. Also cases where the moment the federal question is stated by counsel we all know that there is nothing in it. This has become such a burden and abuse that we either refuse to hear, or hear only one side of many such, and stop the argument, and have been compelled to adopt a rule that when a motion is made to dismiss, shall only be heard on printed argument. If the temptation to do this is so strong under the rule of this court for over eighty years, to hear only the federal question, what are we to expect, when, by merely *raising* one of those questions in any case, the party who does it can bring it here for decision on all the matters of law and fact involved in it. It is to be remembered that there is not even a limitation as to the value in controversy in writs to the state courts as there is to the circuit courts, and it follows that there is no conceivable case so insignificant in amount or unimportant in principle that a perverse and obstinate man may not bring it to this court by the aid of a sagacious lawyer raising a federal question in the record—a point which he may be wholly unable to support by the facts, or which he may well know will be decided against him the moment it is stated. But he obtains his object, if this court, when the case is once open to re-examination on account of that question, must decide all the others that are to be found in the record.

It is impossible to believe that Congress intended this result, and equally impossible that they did not see that it would follow if they intended to open the cases that are brought here under this section, to re-examination on all the points involved in them, and necessary to a final judgment on the merits.

The 25th section of the act of 1789, has been the subject of innumerable decisions, some of which are to be found in almost every volume of the reports, from that year down to the present. These form a system of appellate jurisprudence, relating to the exercise of the appellate power of this court over the courts of the states. That system has been based upon the fundamental principle that this jurisdiction was limited to the correction of errors, relating solely to federal law. And though it may be argued with some plausibility that the reason of this is to be found in the restrictive clause of the act of 1789, which is omitted in the act of 1867, yet an examination of the cases will show that it rested quite as much on the conviction of this court, that without that clause and on general principles, the jurisdiction extended no further. It requires a very bold reach of thought, and a readiness to impute to Congress a radical and hazardous change of a policy vital in its essential nature to the independence of the state courts, to believe that that body contemplated, or intended, what is claimed by the mere omission of a clause in the substituted statute, which may well be held to have been superfluous, or nearly so, in the old one.

Another consideration, not without weight in seeking after the intention of Congress, is found in the fact that where that body has clearly shown an intention to bring the whole of a case, which arises under the constitutional provision, as to its subject-matter under the jurisdiction of a federal court, it has conferred its cognizance on federal courts of original jurisdiction, and not on the supreme court.

It is the same clause and the same language which declares in the constitution, that the judicial power shall extend to cases arising under the constitution, laws and treaties of the United States, and to cases of admiralty and maritime jurisdiction. In this same act of 1789, the jurisdiction in admiralty and maritime cases is conferred on the District Courts of the United States, and is made exclusive. Congress has, in like manner, conferred upon the same court exclusive original jurisdiction in all cases of bankruptcy.

Upon the circuit court it has conferred jurisdiction with exclusive reference to matters of federal law, without regard to citizenship, either originally or by removal from the state courts, in cases of conflicting titles to land under grants from different states. 1 U. S. Statutes, 89. In cases arising under the patent laws. 16 U. S. S. 206, 215. In suits against banking associations, organized under the laws of the United States. 13 U. S. S. 116. In suits against individuals, on account of acts done under the revenue laws of the United States. Act of March 2, 1833, 4 U. S. S. 632, and July 13, 1866, 14 U. S. S. 176. In suits for damages for depriving, under color of state laws, any person of rights, privileges, or immunities secured to him by the constitution or laws of the Uunited States. Act of May 31, 1870, 16 U. S. S. 114; April 20, 1871, 17 U. S. S. 13. See also, for removal of cases of similar character from state courts, act of March 3, 1863, 12 U. S. S. 756; April 9, 1866, 14 U. S. S. 46; May 31, 1870, 16 U. S. S. 144.

These acts, and perhaps others not enumerated, show very clearly that when Congress desired a case to be tried on all the issues involved in it, because one of those issues was to be controlled by the constitution, laws, or treaties of the United States, it was their policy to vest its cognizance in a court of original jurisdiction, and not in an appellate tribunal.

And we think it equally clear that it has been the counterpart of the same policy to vest in the supreme court, as a court of *appeal* from the state courts, a jurisdiction limited to the questions of a federal character, which might be involved in such cases.

It is not difficult to discover what the purpose of Congress in the passage of this law was. In a vast number of cases, the rights of the people of the Union, as they are administered in the courts of the states, must depend upon the construction which those courts give to the constitution, treaties, and laws of the United States. The highest courts of the states were sufficiently numerous, even in 1789, to cause it to be feared that, with the purest motives, this construction given in different courts would be various and conflicting. It was desirable, however, that whatever conflict of opinion might exist in those courts on other subjects, the rights which depended on the federal laws should be the same everywhere, and that their construction should be uniform. This could only be done by conferring upon the Supreme Court of the United States—the appellate tribunal established by the constitution—the right to decide these questions finally and in a manner which would be conclusive on all other courts, state or national. This was the first purpose of the statute, and it does not require that, in a case involving a variety of questions, any other should be decided than those described in the act.

Secondly. It was no doubt the purpose of Congress to secure to every litigant, whose rights depended on any question of federal law, that that question should be decided for him by the highest federal tribunal if he desired it, when the decisions of the state courts were against him on that question. That rights of this character guaranteed to him by the constitution and laws of the Union, should not be left to the exclusive and final control of the state courts.

There may be some plausibility in the argument that these rights cannot be protected in all cases, unless the supreme court has final control of the whole case. But the experience of eighty-five years of the administration of the law under the opposite theory, would seem to be a satisfactory answer to the argument. It is not to be presumed that the state courts, where the rule is clearly laid down to them on the federal question, and its influence on the case fully seen, will disregard or overlook it, and this is all that the rights of the party claiming under it require. Besides, by the very terms of this statute, when the supreme court is of opinion that the question of federal law is of such relative importance to the whole case that it should control the final judgment, that court is authorized to render such judgment and enforce it by its own process. It cannot, therefore, be maintained that it is in any case necessary for the security of the rights claimed under the constitution, laws or treaties of the United States, that the supreme court should examine and decide other questions not of a federal character.

And we are of opinion that the act of 1867, does not confer such a jurisdiction.

This renders unnecessary a decision of the question whether, if Congress had conferred such authority, the act would have been constitutional. It will be time enough for this court to enquire into the existence of such a power when that body has attempted to exercise it in language which makes such an intention so clear as to require it.

[Concluded in our next.]

Bankrupt Act—Fraudulent Preference—Retroactive Effect of Amendments of 1874—"Knowledge" and "Reasonable Cause to Believe."

SINGER, ASSIGNEE OF TOWLE, v. SLOAN *ET AL.*

United States District Court, Eastern Distict of Missouri, February, 1875.

Before Hon. SAMUEL TREAT, District Judge.

1. **Bankrupt Act—Fraudulent Preferences—§ 11 of Act of 1874 Retroactive.**—The 11th section of the act of June 22, 1874, amendatory of the bankrupt act, applies to all alleged preferences, had since Dec. 1, 1873, whether arising in a case of voluntary or involuntary bankruptcy. *Quære*, whether it does not apply to all antecedent transactions and cases pending and undetermined.

2. ——. ——. **"Knowledge" and "Reasonable Cause to Believe."**—*Knowledge* that a fraud on the act was intended, must be proved; and "reasonable cause to believe" is not, in law or fact, the same as actual knowledge.

3. ——. **Procedure—Additional Meeting of Creditors.**—To effect the due administration of the bankrupt act in compulsory cases brought prior to June 22, 1874, where a meeting to show cause why a discharge should not be granted, was held antecedent to that date, and no opposition thereto was made, it is proper for the court to order another meeting of creditors.

4. ——. **Retroactive Effect of § 9 of Act of 1874—Applications for Discharge.**—Section 9, of the amendatory act of June 22, 1874, applies to all *voluntary* as well as all involuntary cases still pending, and must control as to the rules governing applications for the discharge, whether the undetermined application was made before or after that date.

5. ——. **Scope of § 12 of Act of 1874.**—Section 12 of the amendatory act, although purporting to amend only section 39 of the previous act, necessarily amends and alters the rule previously established by section 23 of the act of 1867.

6. **Cases Criticised.**—The cases of Hamlin v. Pettibone, 1 CENT. L. J. 404, and Brooke v. McCracken, 6 Chi. Leg. News, 10; 8 Pac. L. R. 102, considered.

Binswanger & Jones, for assignee; *Geo. D. Reynolds*, for Sloan, defendant.

TREAT, J.—On the 21st day of January, 1874, a petition in bankruptcy was filed against Towle by some of his creditors, and on the following 3d of February he was adjudged a bankrupt. The plaintiff is his assignee. On the 18th of December, 1873, said Towle and wife executed a deed of trust to secure the defendant, Sloan, for alleged antecedent indebtedness. This bill was filed December 9, 1874, to have said deed set aside as in contravention of the bankrupt act, on the ground that Towle, at the date of its execution and delivery, was insolvent, and that Sloan had *reasonable cause to believe*, etc.

The defendant demurs to the bill on the theory that the allegations should conform to the amendatory act of June 22, 1874, and charge that the defendant knew a fraud on the act was intended. Whether the construction put upon the latter act in the case of Hamlin v. Pettibone be correct or not (1 CENT. LAW JOUR. 404), it evidently does not cover this case; although the views of Judge Deady, in Brooke v. McCracken (7 Chicago Legal News 10), go far enough, if sustained, to defeat this demurrer.

In both of those cases it was asserted, or at least very strongly intimated, that the insertion of the words "know," etc., in sections 35 and 39, does not vary the requirements or force of the statute as it previously stood; for those learned judges intimate that a man is to be presumed in law to *know* what he had reasonble cause to believe.

The broad distinction, however, between "knowledge" and "reasonable cause to believe," if not apparent on a simple repetition of the terms, has been too well recognized by many decisions, even of the United States Supreme Court, to be ignored.

See Foster v. Hackley, 2 B. R. 131; Graham v. Stark, 3 Id. 92; *In re* J. B. Wright, 2 Id. 155; *In re* Arnold, 2 Id. 61; White v. Rafferty, 3 Id. 53; Merch. Nat. Bank v. Truax, 1 Id. 146; Foster v. Howe, 102 Mass. 427; Scammon v. Cole, 3 B. R. 100; Tiffany v. Lucas, 1 Dillon, 166; Same, 15 Wall. 410; Buchanan v. Smith, 16 Wall. 277; Walbrum v. Babbit, 16 Wall. 577; Toof v. Martin 13 Wall. 40. Indeed, the marked distinction runs through nearly every case; and generally has been the point on which the case turned. Besides, the amendment is supposed to effect a needed change, and in the light of the then existing decisions, the change made is serious and important. It will, in cases at law devolve on the jurors the duty to find that *knowledge* existed, and not merely reasonable cause to believe a fact to be ascertained by them. It cannot be held that a man *knows* a fact, when there exist only suspicious or surrounding circumstances, which, if thoroughly investigated, might discover the truth. Courts have repeatedly held concerning the phrase "reasonable cause to believe," that the preferred creditor could not escape by wilfully shutting his eyes to what would have been discovered, had he made the enquiry which a prudent man would have done—that the mere existence of such suspicious circumstances as should have induced enquiry, would, if seen, or called to the attention of the creditor, bring him within the force of the statute. It is apprehended that far more is now required. The rule, as it previously stood, was somewhat vague and uncertain. Often it occurred that on precisely the same testimony two jurors would reach directly opposite conclusions, even when the court carefully defined the meaning of the phrase.

Congress, being aware of the stringency of the legal construction given, and desiring to remove so stringent and somewhat arbitrary a rule, amended the law in order to affect only such transactions as are evidently *mala fide*—that is such as are tainted with actual *knowledge*.

The next important question presented by the demurrer, is, what class of cases is affected by the amendments of June 22, 1874? In compulsory cases, actually commenced, though not determined prior to Dec. 1, 1873, Judge Hopkins held (Hamlin v. Pettibone) that the amendments do not apply. The amended section, 39, by its terms, covers all compulsory cases from Dec. 1, 1873, and in that opinion, although the point is not decided, perhaps, yet it is strongly intimated that a distinction exists between two cases brought by assignees of voluntary and involuntary bankrupts. The case before him required for this decision this important point, viz.: whether, in an involuntary case, where an adjudication had been had, and a suit by the assignee was pending against a preferred creditor, prior to Dec. 1, 1873, the amendment had any application. That point he decided in the negative. The opinion of Judge Deady, however, is, that the amendments of section 35 are

entirely prospective, so that no case brought before, or act done before, June 22, 1874, is within the purview of the later act, but are to be considered as falling within the provisions of sect. 35, as it previously stood. If the opinions in those two cases are correctly understood, such seems to be their scope.

It is evident that the terms of the act of June 22, 1874, leave many questions open to judicial construction. Section 9 embraces both compulsory and voluntary cases, and does not in terms state when that section shall take effect — whether it shall be retroactive or prospective, whether it shall apply to pending cases, or if to pending cases, to what classes. At the last term of the U. S. Circuit Court, Justice Miller held that the first clause of said section applied to *all* pending, as well as to all future cases.* Hence, if a compulsory bankrupt is to be discharged of his indebtedess, irrespective of the percentage paid, or of the assent of any of his creditors, whether the petition was filed before or after the said act of June 22, it is obvious that glaring frauds upon the whole system might be perpetrated, unless some mode of practice is adopted to prevent such mischief. If a debtor, adjudicated a bankrupt—say in 1868, on the petition of a creditor, can now—some six years after the meeting of his creditors, called to show cause why he should not be discharged, at which meeting no one appeared to make opposition, receive his discharge on the simple ground that, no opposition having been made, and said act of June 22, being retroactive, he is entitled to his certificate; then, despite the most glaring frauds, he can have the benefits intended by the act solely for the benefit of honest debtors.

It follows, by no means, that when a meeting in a compulsory case was called to show cause, prior to June 22d 1874, and no opposition was formally interposed to the discharge, that the bankrupt was entitled to the same. It might be that the creditors knew full well that his estate had not been equal to the percentage then required, and that he had not, and could not, obtain the assent of the then requisite number of his creditors. So knowing, none of his creditors interposed on the ground of *fraud*; because all creditors knew that under the law as it then was, the bankrupt could not be discharged, whether a fraud on the act had been perpetrated or not. If the 9th section of the amendatory act is retroactive in compulsory cases, as Justice Miller holds, shall an adjudicated bankrupt in 1868 receive his certificate of discharge now, because no creditor entered opposition thereto in 1868, at the meeting then held pursuant to the statute as it then existed? As the bankrupt could not, in 1868, procure his discharge without the prescribed percentage or assent, even if no fraud was alleged, the creditors did not undertake the unnecessary labor of appearing and averring fraud.

The embarrassments thus arising, this court has often suggested, and to give full force to the act as amended, has, whenever an application for discharge has been made in a compulsory case adjudicated prior to June 22d, 1874, and the meeting had been held prior thereto, caused another meeting of creditors to show cause to be held, and notice thereof to be given. A meeting held previously, where no opposition was interposed, did not show that no fraud had existed, or that the fact thereof would not have been presented if the bankrupt had not been, on other grounds, as shown by the record itself, unable to procure his certificate.

The amendatory statute, like all others of a similar character, which in some of its provisions is retroactive, involves necessarily many doubtful and complicated questions. It has been held, and must in this circuit be considered as settled, that although all compulsory cases are, by the express terms of the act, if instituted after Dec. 1, 1873, subject to its provisions, yet they are not so subject as to adjudications had therein prior to the date of the amendatory act. Those decisions extend no further than that previous adjudications are valid. As to the many other and incidental questions arising, there are no authoritative expositions or decisions.

In the matters now before the court, questions are raised as to the retroactive effect of the amendatory act—*first*, as to transactions after Dec. 1, 1873, and, *second*, as to cases based on such transactions brought after the passage of said act. Does the amendatory act, in compulsory cases, cover all transactions since Dec. 1, 1873? If so, then unless the preferred creditor had *knowledge* of the intended fraud, the preference obtained cannot be invalidated.

If said amendatory act does not cover such transactions, but relates only to *cases* brought after its passage; are all fraudulent preferences before Dec. 1, 1873, and all after that date, and prior to the passage of the act, to be governed by the rule of "reasonable cause to believe," as contradistinguised from actual *knowledge?*

If the first clause of section 9, of the amendatory act, which relates to compulsory bankruptcy, operates on *all* such cases, no matter when brought,—whether past or future, why should not the second clause, as to *voluntary* cases, have the same effect? The first clause declares that previous provisions, as to compulsory cases, shall not apply; and the second, after laying down a new rule as to voluntary cases, repeals in express terms the provisions of the act of 1867. Some United States district courts have held that the repealing clause must be construed, not to affect the prior statutes on that subject, amendatory of the act of 1867; and consequently the needed percentage of fifty per cent. remains as to prior cases; while other of those courts hold that as the act of 1867 is expressly repealed, the intermediate amendments thereof fall with it, and, therefore, as to all voluntary cases prior to June 22, 1874, the bankrupts are entitled to their discharge irrespective of *any* percentage of their estates or the assent of any of their creditors. The reasons for dissent to those decisions must readily occur to every one who carefully analyzes the various acts. As the law stood before June 22, 1874, in both compulsory and voluntary cases, the same requisites for a discharge obtained. The amendatory act (sec. 9), as interpreted by Justice Miller, applies, so far as compulsory cases are concerned, to all past as well as all future cases; and why not the provisions as to voluntary cases included in the same section? especially as with regard to the latter, in order to make the intention of Congress more emphatic, an express clause of repeal was added? If all compulsory cases undetermined are included within the terms of that section, so are all voluntary cases. The manifest purpose was to subject all such cases, compulsory and voluntary, to the new statutory rule. If the rule as to one class of cases retroacted, so does it as to the other, *a fortiori*. Hence, in voluntary cases undetermined, as well as in compulsory cases, sect. 9 of the amendatory act must control.

The established doctrine here must be, that said section 9 controls in all pending cases,—whether voluntary or involuntary,—and no matter when instituted.

Section 10 of the act of 1874 provides, expressly, when its provisions shall take effect, viz.: in two and three months, respectively, thereafter. In reducing the time within which conveyances, preferences, etc., were to be invalidated, and in giving the amendatory section no force until after the respective two and three months had expired, it is obvious that Congress designed not to interfere with past transactions or with cases under section 35, which were then pending, so far as time was an element. Thus, where *four* months was the prescribed time under the unamended section 35, the amendment provides that thereafter two months should be the rule, but that the amendment should not take effect for two months; thus leaving as they were, all pending cases, and also all acts done under the *four* months' provision. So in a similar manner as to the six months' clause.

Section 11 of the act of 1874 is also amendatory of sect. 35 of

In re King, 1 CENT. L. J. 506.

the act of 1867, and is designed to change the rule as to "reasonable cause to believe," but it does not state to what cases the new rule shall apply. Governed by ordinary rules of interpretation, no cases previously brought, and no act previously done, would be affected, unless the court construes the provisions of section 35, in the act of 1867, and of section 11, in the act of 1874, as falling within the principles applicable to remedies alone. This court cannot hold that those provisions are merely of the latter character.

The remedy was changed by sec. 10, whereby the *time* was altered, and the legal character or quality of the act was changed by sec. 11. But section 11, not stating on what, or when, it should go into operation, would unquestionably be entirely prospective, unless the other provisions of the amendatory act, taken *in pari materia*, compel a different construction. By that section guilty knowledge is an essential element. Section 9 acts on past transactions and pending cases; section 10 is by its express terms not to take effect until the times therein named; and section 12 is declared to apply to all past and pending cases mentioned in it which arose after December 1, 1873—thus retroacting for many months. Section 12 enacts, among many other changes, that conveyances, preferences, etc., shall be invalid when the person receiving the same had reasonable cause to believe the debtor was insolvent, "and *knew* that a fraud on this act was intended; and such person if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt; *and this limitation on the proof of debts shall apply to cases of voluntary* as well as involuntary bankruptcy." Here are marked changes, not in the former section 39 alone, but necessarily in section 23 also; for guilty knowledge takes the place of "reasonable cause to believe," and a creditor, in cases of *actual* fraud, impliedly is permitted to prove a moiety of the debt. The law as it was previously (sec. 39), provided that when the person, whether a creditor or purchaser, received payment or a conveyance, having reasonable cause to believe, etc., the assignee might recover back, and that the creditor should not be allowed to prove his debt—that is, any part of his debt. Now, although a creditor, even in the case of actual fraud, is permitted to prove not exceeding a moiety, section 23 did not permit a preferred creditor, even though innocent of *actual* fraud, to prove his debt before he had surrendered all advantage sought to be gained. Under that provision the courts have generally held, that the surrender contemplated must be voluntary; and that when the preferred creditor resisted the demand of the assignee, and made the surrender only when forced to do so by litigation and under judgment obtained against him, he was not entitled to prove his debt or any portion thereof. The amended section 39, by its terms, changes section 23 in the respects stated above. It, therefore, cannot be considered a correct mode of construction to look only to the language of the special amendatory section; for though it may purport to amend only one of the many former sections of the act of 1867, it may by its provisions work an important change in many other sections.

The amended section 39 says: "And the provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy commenced since the 1st day of December, 1873, as well as to those commenced hereafter." Resting there, no voluntary cases would be included; but as quoted above, the same section provides that the "limitation on proof of debts shall apply to cases of *voluntary* as well as involuntary bankruptcy." To what cases?—those commenced after December 1, 1873, or to those commenced after the passage of the amendment, or to all cases? In every suit to recover back, the questions on which the right of recovery must rest, will necessarily be adjudicated; and it actual fraud is found, then by the amended section 39 the creditor is limited in his proof of debt to a moiety of his demand. Hence, if that provision as to voluntary cases covers all commenced since December 1, 1873, and guilty *knowledge* is an essential element, how is it possible to recover under sec. 35, without proof of such guilty *knowledge?* True the limitation is in terms as to *proof of debt;* but the ascertainment of the fact whereby the limitation operates, must necessarily be involved in the suit to recover back. It may be, that, under sec. 23, when a voluntary surrender is made, the enquiry as to actual fraud will arise only on the attempt to prove the debt; yet the distinction as to actual and constructive fraud will have to be observed. If guilty knowledge exists, the actual fraud must also exist. The former sec. 35 presented cases of constructive fraud, independent of any actual knowledge; but if now, in passing upon the creditor's rights—at least in all cases since December 1, 1873—it is necessary to enquire into actual fraud, or guilty knowledge—how can it be fairly urged that the statute was not intended in that respect to apply to all cases arising under sec. 35, as well as under sec. 39?

This extended review of the amendatory act has been made in order to reach a right conclusion as to sec. 11 of the act of 1874. It imports into the former sec. 35, the element of guilty knowledge; and so does sec. 12 import the same element into compulsory cases. Sec. 12 is declared in the particulars above stated to apply also to voluntary cases, and the whole section is made applicable, to say the least, to all cases commenced since December 1, 1873. Hence any construction put upon sec. 11, which leaves sec. 35 unamended as to cases since December 1, 1873, would render the amendatory act inconsistent with itself.

It is not necessary for the purposes of this demurrer, to decide whether cases brought or acts done prior to said December, are to be controlled by the amendment; to avoid all doubt as to the views of the court, it is now held that said sec. 11 of the act of 1874 controls all cases brought since December 1, 1873.

There are many difficulties in reaching a satisfactory interpretation of the different amendatory sections; but when they are fully considered and analyzed, it seems clear that Congress intended to modify and mitigate the rigid rules previously adopted. Where it has done so, unless some provision to the contrary appears in the specified section, the amendments should be considered as applicable to all pending cases; otherwise the rulings in the circuit court at the last term, on sec. 9, could not stand. Certainly the same reasoning which produced those rulings would exact the construction now given.

At the first reading of the opinions given in the Wisconsin and Oregon districts, their conclusions seemed satisfactory, except as to the force of the amendment concerning guilty knowledge; and hence, this court has heretofore intimated its assent thereto, except as to *knowledge*. The question has now, for the first time, been presented for formal determination here; and in passing on it, the well-known learning and research of the judges who decided those cases, demanded a careful and pains-taking review of the whole subject, in the light of the rulings made in this circuit. Those rulings here have necessarily, whether in accord with the views of this court or not, had a controlling influence on the decision of the case submitted.

The demurrer is sustained, with leave to amend.

NOTE.—The opinion in the case of Brooke v. McCracken, was delivered by Mr. District Judge Deady, in the Circuit Court of the United States for the District of Oregon, on the 14th of September, 1874. The following is the text of it, as re-printed from the Chicago Legal News:

Opinion of the court by DEADY, J.

This is an action brought by the assignee of C. B. Comstock & Co., to recover of the defendant the sum of $877.82, the alleged value of 125 barrels of flour, received by him from the bankrupts contrary to the bankrupt act.

The amended complaint alleges that Comstock & Co. were adjudged bankrupts on January 10, 1874, upon a petition filed December 16, 1873; and that on December 6, 1873, the bankrupts being indebted to the defendant in the sum of $1,000, and insolvent, did, with a view to give a preference to the defendant, deliver to him, as a payment on said indebtedness, 125 barrels of flour, the property of said bankrupts, at and for the price of $6 per barrel; and that said defendant then and there had reasonable cause to believe that

said Comstock & Co. were insolvent, and that said transfer or payment was made in fraud of the bankrupt act.

The defendant demurs, and assigns for causes of demurrer: (1) That the court has not jurisdiction of the action; and (2) that the complaint does not state facts sufficient to constitute a cause of action.

In support of the first ground of demurrer, it is claimed that this is an action to recover a mere debt, and is therefore only cognizable in the district court, according to the ruling in Bachman v. Packard, 7 N. B. R, 353, in which it was held in the language of the syllabus, that:

"The concurrent jurisdiction conferred upon the circuit court by sec. 2 of the bankrupt act is limited to cases where there is a controversy concerning the *right to* or some *interest in* some specific thing between the assignee and a third person, and does not include an action to collect a simple debt."

This was an action upon a promissory note made by the defendant to the bankrupt. But here the defendant does not nor did not owe the bankrupt anything, but, on the contrary, the bankrupt owed him. Neither does the defendant *owe* the assignee anything. The demand is not a debt in any legal sense of the term, but a claim for unliquidated damages for the unlawful detention or conversion of property, which the latter is seeking to have ascertained and established by the judgment of this court.

This is an action to recover the value (as damages) of certain property alleged to have been transferred to the defendant contrary to the bankrupt act. The right to maintain it was never in the bankrupt. The assignee derives his right to sue, not from the bankrupt, but from sec. 35 of the act, as the representative, and for the benefit of the other creditors. That section declares that a payment or transfer, made under the circumstances stated in the complaint, "shall be void, and the assignee may recover the property or the value of it" from the creditor receiving it. In the language of the clause of sec. 2, conferring jurisdiction upon this court, it is an action by the assignee "*touching* property of said bankrupt against a person claiming an adverse interest" therein.

It is admitted that the assignee might maintain replevin for the property in this court. Of this there can be no doubt. And it is equally plain that he may maintain trover for its value. The act gives the right to maintain either in the same direct language—"the assignee may recover the *property* or the *value* of it"—and the one is as much an action "*touching* the property" as the other. So far as the nature of the controversy and the substantial rights of the parties are concerned, there is no difference between the two actions. In the one case the judgment is for the delivery of the specific goods or their value, and in the other for their value only. Each is a proper remedy for a wrong "touching property," in which the defendant claims or may claim an interest adverse to the plaintiff. See Smith v. Crawford, 9 N. B. R. 38.

Upon the argument of the second cause of demurrer, it was assumed by counsel for defendant, and hardly denied by counsel for plaintiff, that sec. 11 of the act of June 22, 1874, which amends sec. 35 of the bankrupt act, by substituting the word "knowing" for "reasonable cause to believe," is applicable to transactions occurring before the passage of the amendment.

But this cannot be so. Upon the conditions stated in the complaint, the right to recover this property or the value thereof, in trust for the creditors, was vested in the assignee at and before the passage of the act.

Even admitting that Congress has the power to affect vested rights by retroactive legislation (Watson v. Mercer, 8 Pet. 110; Carpenter v. Penn., 17 How. 463; Evans v. Eaton, Pet. C. C. 323), such effect will not be given to its enactments, unless the intention so to do plainly appears therein.

In Harvey v. Tyler, 2 Wall. 347, the court said: "It is a rule of construction that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect.' In Steamship Co. v. Joliffe, Id. 458—Mr. Justice Field speaking for the court—it was held that where a right arises under or is given by a statute, and it "has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it or *an action for its enforcement. It has become a vested right which stands independent of the statute.*"

In McEwen *et al.* v. Den, lessee, 24 How. 244, the rule is laid down, "that it is the very essence of a new law, that it shall apply to future cases, and such must be its construction, unless the contrary plainly appears."

In United States v. Starr, Hemp. 471, the court says: "In the construction of a statute, it is a cardinal and well established principle that the court will never give to it a retrospective operation, unless it clearly appears from the language used that its makers intended it to have that effect; because laws are generally made to operate upon the future not the past transactions of men." To the same effect is the ruling in Schenck v. Pelay, 1 Wool. 175; *Ex parte* Billings, 3 Ben. 212. The repeal of a statute, after a lien has been acquired under it, does not affect the lien. *Ex parte* Hope M. Co., 1 Sawyer, 110.

There is not a single circumstance in or out of the act which indicates that Congress intended sec. 35, as amended, to have a retroactive effect in any particular. It was amended by adding two words and a clause, and substituting the word "knowing" for the understood expression "reasonable cause to believe." Nothing is said or implied as to when it shall take effect, and therefore it comes within the general rule, declaring it to take effect from its passage, and only to operate prospectively. As to secs. 10 and 12 of the amendment, Congress made special provision when they should take effect—the former after and the latter before its passage. This, itself, is a significant circumstance to show that it was the intention of Congress to let the other sections take effect according to the general rule.

In Hamlin v. Pettibone, 1 Cent. L. J 405, Mr. Justice Hopkins, in the course of an interesting and suggestive opinion upon this subject, says:

"There are many provisions of the act of a practical character, that may be properly applied in further proceedings in all cases, such as those relating simply to the administration of the law, and as do not affect existing rights or the validity of contracts. Such provisions are of a remedial character, and may be presumed to have been intended to be applied to all cases; but such parts as relate to the substantial rights of parties, acquired under the original law, like the amendments to sec. 35, I think it must be held that Congress did not intend to apply to cases occurring before the adoption of the amendment."

It is also a question whether the amendment has changed the legal effect of the section. The general rule is, that a party who has sufficient notice to put him upon enquiry is chargeable with *knowledge* of all facts which by a proper enquiry he might have ascertained. Goodman v. Simonds, 20 How. 363; Carr v. Hilton, 1 Curtis C. C. 393; Scammon v. Cole, 5 N. B. R. 263. In Hamilton v. Pettibone, *supra*, Hopkins, J., says: "But it seems to me in almost every case, where the jury would be warranted in finding that the party 'had good reason to believe,' under the old statute, they would be justified in finding that he 'knew' under the amended law, so that practically the amendment is a merely verbal one in that respect."

Unless, then, it can be held that the amendment has substantially changed the section simply because it is to be presumed that Congress would not have changed its language without intending to vary its effect, I do not see that the amendment is material.

Again, that must be a fraud upon the act which *evades* or *defeats* its due operation. When, therefore, a creditor receives a payment of money or property, with reasonable cause to believe his debtor insolvent, whether he also *knows* that a fraud upon the act is thereby intended, is a question of law rather than fact. This must be so, because the necessary effect of such payment is to prevent the money or property so paid from being distributed among a mass of creditors as the act provides. The due operation of the act in the premises is thereby evaded and prevented. This necessary consequence of his act the debtor is presumed to intend. But the creditor under the circumstances supposed, also knows that the payment is a fraud upon the act, and therefore he is presumed to have knowledge that such was the debtor's intention in making it, because it was the necessary consequence of it.

Upon the argument no other objection was made to the sufficiency of the case stated in the complaint. But it is a question in my mind whether the assignee will not be bound to prove on the trial a demand and refusal of the property or its value, and if so, whether the same should not be alleged in the complaint. Although the bankrupt act (sec. 35) declares this payment to the defendant void without qualification, from the nature of the case I think this is so only as against the assignee representing the other creditors. It could not have been intended to make the transaction void as between Comstock & Co. and McCraken. Assuming this to be so, the receipt of the property by the defendant was not a tortious taking, and unless the subsequent detention has become wrongful for some other reason, it is necessary that there should be a demand and refusal to make it so. See Stanley v. Gaylord, 1 Cush. 536; Perkins v. Barnes, 3 Nev. 557; Whitman, etc., v. Tuttle, 4 Id. 498; Boulware v. Craddock, 30 Cal. 191; Marshall v. Davis, 1 Wend. 109; Barrett v. Warren, 3 Hill, 348.

Upon the points made in the argument the demurrer is overruled.

William Strong, for plaintiff; *Cyrus A. Dolph*, for defendant.

—THE following personal is to be credited to the Washington Chronicle: A friend of Judge Lawrence, of Ohio, was discoursing on his abilities as a lawyer to a member of Congress, and remarked that "he was the best lawyer in Ohio." The member rather demurred to this statement, and observed to that, there were not only a great many lawyers in Ohio but a great many *good* lawyers, and to say any man was the best of all, was a most invidious distinction. "Not at all," replied the narrator, "it is acknowledged by everybody out in our region that Judge Lawrence stands at the head of the profession in the state—in fact there is no doubt about it, for *he admits it himself.*

The Old Policy Again.

The President has astonished even his political friends by suddenly proposing to do, in Arkansas, what he has obstinately refused to do in Louisiana, namely, confess that he has made a mistake, and that he is not infallible after all. The nature and gravity of his admitted mistake will be understood by noting the two sides of his policy as exhibited below by himself:

FOR BAXTER.

By the President of the United States of America—A Proclamation.—Whereas, certain turbulent and disorderly persons, pretending that Elisha Baxter, the present executive of Arkansas, was not elected, have combined together with force and arms to resist his authority as such executive, and other authorities of said state; and,

Whereas, said Elisha Baxter has been declared duly elected by the general assembly of said state, as provided in the constitution thereof, and has for a long period been exercising the functions of said office, into which he was inducted according to the constitution and laws of said state, and ought by its citizens to be considered the lawful executive thereof; and,

Whereas, the said Elisha Baxter, under section 4 of article IV, of the constitution of the United States, and the laws passed in pursuance thereof, has heretofore made application to me to protect said state and the citizens thereof against domestic violence, now, therefore,

I, Ulysses S. Grant, President of the United States, do hereby make proclamation and command all turbulent and disorderly persons to disperse and retire peaceably to their respective abodes within ten days from this date, and hereafter submit themselves to the lawful authority of the said executive and other constituted authorities of said state and I invoke the aid and co-operation of all good citizens to uphold law and preserve the public peace.

In witness whereof I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the city of Washington, this 15th day of May, in the year of our Lord, 1874, and of the independence of the United States the 97th.

(Signed) U. S. GRANT.

By the President:

HAMILTON FISH,
Secretary of State.

FOR BROOKS.

To the Senate of the United States: Herewith I have the honor to send, in accordance with the resolution of the senate of the 3d inst., all the information in my possession not heretofore furnished relative to affairs in the state of Arkansas. I will venture to express the opinion that all the testimony shows that in the election of 1872, Joseph Brooks was lawfully elected governor of that state; that he has been unlawfully deprived of the possession of his office since that time; that in 1874 the constitution of the state was, by violence, intimidation and revolutionary proceedings, overthrown, and a new constitution adopted, and a new state government established. These proceedings, if permitted to stand, practically ignore all the rights of minorities in all the states. Also, what is there to prevent each of the states recently readmitted to federal relations on certain conditions, from changing their constitutions and violating their pledges, if this action in Arkansas is acquiesced in? I respectfully submit whether a precedent so dangerous to the stability of state government, if not of the national government also, should be recognized by Congress. I earnestly ask that Congress will take definite action in the matter to relieve the executive from acting upon the questions which should be decided by the legislative branch of the government. U. S. GRANT.

Executive Mansion, Feb. 8, 1875.

The history of the Arkansas case, now unexpectedly revived after having been apparently disposed of, is briefly this: Before 1872, Joseph Brooks was an associate of the Clayton ring, headed by Senator Powell Clayton, one of the worst of the carpet-baggers in office, but becoming dissatisfied with the way the concern was working for himself, he seceded, and set himself up in 1872 for governor as a Greeley candidate. He was probably elected, but the legislature, made by the constitution of 1868 sole judge of election returns, was under the control of Clayton, and duly counted Brooks out, installing Elisha Baxter, regular republican. The contest between the two, last spring, will be remembered; it was attended with a burlesque war, and some bloodshed, which the President's proclamation was issued to quell. Baxter, however, did not prove satisfactory to the Clayton ring, and they turned against him. Brooks ineffectually tried to use the federal courts to oust Baxter; the state supreme court also decided that the matter lay entirely with the legislature, and that no court had jurisdiction; pending the decision of the President between the claimants, Brooks called the legislature together, which passed an ordinance ordering a constitutional convention. That body was chosen June 30 last, met July 14, framed a new constitution, which was adopted October 13, by a vote of 78,697 to 24,807, although its validity was denied by the republican state convention September 16. A. H. Garland was elected governor at the same time in October, under the new constitution by an overwhelming majority. Baxter quietly acceding, but in November Mr. Volney V. Smith, lieutenant-governor under Baxter, suddenly appeared and put in *his* claim to succeed Baxter, on the plea that the new constitution was invalid, not having been framed in accordance with the provisions of the old one, and that he was entitled to fill the unexpired portion of Baxter's term, for the remainder of 1874. About nine months ago, the house appointed a special committee of investigation, and the case now stands thus: Brooks, opposition candidate in 1872, having gone over to the Clayton stripe of republicans, after their unsatisfactory experiment with Baxter, is supported by them; Baxter, once their man, and sustained last May by the President, is now with the democrats and not personally in the struggle; and Garland, the present governor, is also supported by the democrats, the President having refused to recognize him at all.

The question whether it is competent for the people of a state to frame and adopt a new constitution without reference to the forms prescribed for so doing, is not a new one, having already been decided in the affirmative. Brooks holds that the old constitution is still in force, and that he was chosen under it, but four out of the five committeemen—Messrs. Poland, Scudder, Sayler and Sloss, three of them republicans—report thus:

"The people of every state have the right to make their own constitution to suit themselves, provided it be republican in form and in harmony with the constitution of the United States, and the national government has no authority to deprive them of that right. Here we have the case of a state having a constitution republican in form, adopted and ratified by a large majority of the people, administered by officers of their choice, and going forward with reasonable quiet and peace. Your committee cannot find any solid ground on which to stand to say that the general government can, or ought to, interfere; and no amount of irregularity in the processes by which this state of things was brought about, furnishes just reason for doing so. The committee believe that, upon principles now well established, all these defects and irregularities in the proceedings must be regarded as cured by the verdict of the people. The committee do not recommend any action by Congress, or by any other department of the general government, in regard to the state government in Arkansas."

That *deus ex machina*, Mr. Attorney-General Williams, made an elaborate decision last May in favor of Baxter's recognition, and Baxter was duly recognized. The constitution was peaceably adopted; it, and the present governor, unquestionably represent the will of the people, and the workings of the state administration are gradually bringing Arkansas affairs out of chaos. The President now wants to go back and undo his own decision and install the same Brooks, who, as he concluded nine months ago, was not elected. He brings up the familiar charge of violence and intimidation, and enquires what there is to hinder each of the states recently re-admitted to federal ralations on certain conditions from changing their constitutions and violating their pledges if this action in Arkansas is acquiesced in? There is not very much to hinder—only the constitution of the United States, which has come to be regarded as a very insignificant barrier to anything the dominant party want to do. * * * —[*The Financier.*

Notes and Queries.

We submit the following queries to our readers, and request answers through our columns.

I. NOTARY PUBLIC—TERRITORIAL JURISDICTION OF.

Has a notary public in Missouri authority to take acknowledgments of deeds outside the county for which he is appointed?

II. CHANGE OF VENUE IN BANKRUPTCY.

ST. LOUIS, MO., Feb'y 18th, 1875.

EDITORS CENTRAL LAW JOURNAL:—In what cases can the defendant in a suit in equity, instituted by an assignee in bankruptcy, under the bankrupt law, and for what causes, can he take a change of venue from the district judge, and to whom must the case go? Is the prejudice of the judge against the defendant, or the undue influence of the assignee over the mind of the judge, legal cause for a change? Please answer, giving the law upon the subject, and oblige A SUBSCRIBER.

Recent Reports.

IOWA REPORTS, Vol. 35 (Stiles, Vol. 14) Reports of Cases in Law and Equity, Determined in the Supreme Court of the State of Iowa. By EDWARD H. STILES. Ottumwa: 1874. Published by the Reporter.

(Printed by Weed, Parsons & Co., Albany, N. Y.)

The volume before us presents many excellencies and few defects. The typography and press-work are good, and the arrangement of the matter exhibits evidences of care, judgment and experience. The division of the opinions into paragraphs, corresponding to the several grounds upon which the decision of the court is based, is a part of the excellent system of "Inner Temple Practice," adopted by the court, and which has resulted in giving to the profession some of the best and most useful volumes of reports extant. A very interesting account of this admirable system may be found in the Western

Jurist (Des Moines) for May, 1874, and 1 CENT. L. J. 284. The reporter has added to the value of this feature by inserting side-notes containing catch-words in capitals, which render reference to the several paragraphs of the opinion both easy and rapid.

In a prefatory note, it is announced that the succeeding volumes will contain a larger quantity of matter, by the increase of the size and number of the pages, which change is rendered necessary by the increasing business of the court.

It has been a task of no little difficulty to adjust the space allotted to this department of the JOURNAL, to a satisfactory selection from the numerous important causes reported in this volume.

Landlord and Tenant—Estoppel of Tenant to Deny Title of Landlord.—A tenant, whose landlord held title by virtue of tax-deeds, subject to avoidance by redemption by a minor, purchased the minor's right of redemption, and petitioned to be allowed to redeem. *Held*, that the case did not come within any of the exceptions to the rule, that a tenant cannot deny the title of his landlord. Stout v. Merrill, p. 47.

Partnership Real Estate—Lien of Partners.—A conveyance of partnership real estate by a retired partner to his late copartners, in consideration of payment of partnership debts by them for the payment of which he was bound to them, was *held* to be good against the creditors of a later firm of which the grantor had been a member. The real estate was treated in equity as personalty, and the right of the grantee's partners to an equitable lien thereon to equalize payments of the debts of the original firm made by them, was sustained. Evans v. Hawley, p. 83.

Fire Insurance—Conditions of Policy—Negligence.—Action on policy containing stipulation that the assured should keep the "chimneys, fire-places, fire-boards stoves and pipes, all well secured."

The plaintiff's wife, during the summer, in "cleaning house," had removed a portion of the pipe of a stove, which stood in a lower room, the portion removed being in an upper room, through the floor of which it passed before entering the flue. Afterwards, a visitor having complained of being cold, the wife forgetting the removal of the upper portion of the pipe, built a fire in the stove, from which fire was communicated to a bed which had been placed in the upper room over the hole through which the pipe had passed, and the house was consumed.

Held, that the act of removing the pipe was not such a breach of the condition of the policy above quoted as would defeat it, as the plaintiff was not bound to keep the stoves and pipe constantly in use, but could, under the policy, remove them and dispense with their use. This is what was intended by the acts of the plaintiff's wife, and had the stove been actually removed, and a fire built in it, resulting in the destruction of the property, the defendant would have been liable, but the simple act of removing the pipe, was not a breach of the condition of the policy, because it was not contemplated that the stove and pipe should remain constantly in use, and "well secured."

Held, also, in effect, that the act of the plaintiff's wife, in building a fire in the stove, was not such negligence as would avoid the policy, because such act was without fraud or design. We say "*in effect*" because the paragraph of the opinion devoted to this point, does not, in terms, state the conclusion of the court, and does not, therefore, literally bear out the language of the syllabus as we have given it.

Although numerous authorities are cited by the learned chief justice (Beck), who delivered the opinion, it is difficult to see upon what substantial ground the negligence of the plaintiff's wife, in building a fire in the stove, could be excused. The court say: "The law upon this subject seems to be well settled," and quotes Mr. Justice Story (Columbia Ins. Co. v. Lawrence, 10 Peters, 507), as follows: "In relation to insurances against fire on land, the doctrine seems to have prevailed for a great length of time, that they covered losses occasioned by the mere faults and negligence of the assured and his servants, unaffected by any fraud or design." And a number of authorities are cited in support of this proposition. The case of Chandler v. Worcester Mutual Fire Ins. Co., 3 Cush. 328, is also cited to show that the above rule "will not excuse extreme, reckless, and inexcusable negligence on the part of the assured, the consequence of which must have been palpably obvious to him at the time," and the case is regarded as "not in conflict with the current of the authorities," and on this the court say: "The gross degree of negligence and its inexcusable character, coupled with the knowledge of its certain effects, ought, it would seem to us, to raise a presumption that the party intended the obvious and necessary consequences of his act, which, at the time, were apparent to him," and, without announcing a formal conclusion, the court concludes this paragraph, by stating that the principles above stated are substantially embodied in instructions given to the jury; others, requested by the defendant, and presenting different doctrines, were refused by the court. These rulings are approved and need not be further noticed.

A later paragraph overrules the defendant's objection that the verdict was not supported by the evidence. From all which it must be inferred that the court *intended* to affirm the doctrine set forth in the syllabus, viz.: that the defendent could not be excused from liability on account of the negligence which caused the loss—because that negligence was unaccompanied by design or fraud on the part of the plaintiff or his wife.

With all due deference, it must be said that there seems to be enough in the very principles laid down by the court below, and properly approved in the appeal, to have warranted the jury in finding that the act of the plaintiff's wife, in building a fire in a stove which *she knew*, but had merely *forgotten*, had no secure connection with its flue, was inexcusable.

Mr. Justice Miller dissents from the opinion, holding that the covenant to keep the stove pipes, etc., "well secured," was broken, the policy avoided, and the defendants released from liability thereunder. Mickey v. The Burlington Ins. Co., p. 174.

Attorney and Client—Lien for Fees.—After an attorney had reduced a claim secured by mortgage, to judgment, and bid in the mortgaged premises for his client, the relation of attorney and client ceased, and it was *held* that the attorney might retain possession of the sheriff's deed as security for his fees, and purchase the land at a subsequent tax-sale. Citing McLain v. Watkins, 16 Ill. 24. Baker v. Davis, p. 184.

Jurisdiction in Counties Bordering on the Mississippi River.—Indictment for nuisance committed by keeping a house of ill-fame, called a "gun-boat," on the Mississippi river beyond the *medium filum aquæ*. Conviction and defendant's appeal.

Held, that the district court of Lee county had jurisdiction to punish such offence committed anywhere on the waters of the river, although near to the lands of a co-terminous state, and although the said boat rested, a portion of the time, on the soil of an island, near the Illinois shore.

The act of Congress admitting Iowa as a state, gave "concurrent jurisdiction on the river Mississippi, and every other river bordering on the said state of Iowa, so far as the said rivers shall form a common boundary to said state and any other state or states," etc. Gilbert v. Moline Water Power and Manufacturing Co., 19 Iowa, 319, distinguished. M. & M. R. R. Co. v. Ward, 2 Black. 485, and Mahler v. Transportation Co., 35 N. Y. 352, cited.

A *boat*, floating upon the water or stranded upon the shore in low water *held* to be a "house" within the statute making the keeping a "house of ill-fame" indictable. The State of Iowa v. Mullen, p. 199.

Res Adjudicata—Estoppel—Subrogation.—Upon an action to recover damages against a carrier for the loss of a barge loaded with grain, defendant answered that there was no liability to plaintiff, because the grain was insured and the insurance company had paid, thereby becoming, by the terms of the policy, substituted to the rights of the assured, and the plaintiff having sued, as assignee of the *assured*, and not of the insurance company, could not recover. Verdict for plaintiff, less the sum paid by the insurance company. Upon motion by plaintiff to set aside the verdict as finding the sum paid by the insurance company excessive, defendant remitted one half thereof, and judgment was rendered accordingly.

In a subsequent suit between the same parties, setting up an assignment from the insurance company, of the right of action of the assured, and claiming the amount fixed in the former judgment as having been paid by the insurance company, the defendant alleged that the answer made at the former trial that the payment by the company was for the loss, was made upon imperfect information, and that in fact the payment was for expenses and trouble; that the insurance company had not been liable to pay the loss because the vessel which towed the barge was unseaworthy, and that the company had paid in their own wrong. Evidence offered in support of these allegations was objected to but admitted, and a special verdict ordered on the question of the unseaworthiness of the vessel, and returned in the affirmative.

The court on appeal *held*, that the defendant was estopped in the second trial to question the validity of the insurance and the payment under it, having relied upon the same in the former trial, and to set up a new defence, as to the unseaworthiness of the vessel, after alleging payment of the loss by the insurance company, as a defence to the former trial; that the claim of the assured against the insurance company, having been admitted and paid, the same has become *res adjudicata*, and an assignment being shown by plaintiff from the insurance company, plaintiff must be subrogated to the company's right of action, and is entitled to recover, and the judgment of the court below must be reversed. The State National Bank of Keokuk v. The Northwestern Union Packet Co., p. 226.

Relocation of Highway—Measure of Damages.—Where a highway is relocated over other lands of the same owner, the measure of damages should be the amount of damage caused by the new location in excess o the same caused by the original location. If there is no such excess, there should be no damages awarded. Jewett v. Israel, p. 261.

National Bank—Taxation—Shares of Delinquent Stockholder.—A National bank is not liable for delinquent taxes due by its stockholders to the local municipal organizations, unless it be shown that the bank has, or has had, dividends or other money or property belonging to such stockholders. The Iowa statute operates as a statutory garnishment of the bank, requiring it to retain such dividends or moneys, for the payment of taxes on the shares, and if it should appear that no dividends had been declared, it might be shown that the earnings had been placed to the assets as surplus, and such surplus possibly be held to satisfy such taxes. Hershire v. The First National Bank of Iowa City, p. 272.

Right of Removal of Trade Fixtures.—Action in chancery to restrain defendants from removing a brick and stone vault and bank safe therein situated in a business house. The defendants, one of whom was a sheriff, were acting under a writ of replevin sued out by the administrator of the party who erected the vault.

Held, that while trade fixtures can be removed by the tenant upon or prior to the termination of his lease, he cannot subsequently exercise this right, as against a purchaser of the premises who had no notice of his claim.

The case of Wilgus & Ewing v. Getting & Giddings, 21 Iowa, 177, where the facts were that a tenant at will made improvements under a license from the landlord, and that the claimants of the premises had full knowledge of the tenants' rights, was therefore distinguished from this. Dostal v. McCaddon, p. 318.

Statute of Frauds—Contracts Respecting Sale of Personal Property—Exemplary Damages—Measure of Damages.—A. made a verbal contract with B. to the effect that A. should from time to time advance money to B. for the purchase of grain by B.; for which advances A. was to have a lien on grain so purchased, with the right to take possession. *Held*, that the statute requiring evidence of contracts for the sale of personal property, where no part of the property is delivered or price paid, to be in writing, does not apply. Citing Hart v. Farmers and Mechanics Bank, 33 Vt. 252; Pennock v. Coe, 23 How. U. S. 117; Gregg v. Sanford, 24 Ill; Langton v. Horton, 1 Hare, 549; Foreman v. Proctor, 9 B. Mon., 124; Mitchell v. Winslow, 2 Story, 230; Carr v. Allott, 3 Hurl. and Norm. 965.

Exemplary damages are not allowable in an action based on a trespass which, though unlawful, was not malicious. The measure of damages in an action of trespass—for removing personal property, is the market value of the property at the time of removal. Citing Martin v. Porter, 5 Mees. and Wels. 315; Kier v Peterson, 14 Penn. St. 357; Cushing v. Longfellow, 26 Me. 306; Sims v. Glazener, 14 Ala. 695; Gardner v. Field, 1 Gray (Mass.), 151; Gray v. Stevens, 82 Vt. 1; Butler v. Collins, 12 Cal 457. Brown v. Allen, p. 306.

Promissory Note—Payment of Sum Less than Due.—A promissory note payable "on demand when convenient," *held*, to become payable within a reasonable time after its date. Citing Ramot v. Shotenfils, 15 Iowa, 457.

The payment of a smaller sum of money in satisfaction of a larger one is not a valid discharge, and cannot be pleaded, either as payment or as accord and satisfaction. Citing Sullivan v. Finn, 4 G. Greene (Ia.), 544. Authorities cited in Smith's leading cases: (Hare and Wallace's 5th ed.) notes to Camber v. Wane, 439; White v. Jordan, 27 Me. 270; Bailey v. Day, 26 Id. 88; Eve v. Mosley, 2 Strob. 203: Fellows v. Stevens, 24 Wend. 294; Harriman v. Harriman, 12 Gray. 341; Perkins v. Lockwood, 100 Mass. 249; Palmerton v. Huxford, 4 Denio, 166. Works v. Hershey, p. 240.

Dedication—Town Plats—Public Square.—L., with others, laid off certain lands into lots, streets, and squares, forming a town plat. L. called one square by his own name, not subdividing it into lots. The acknowledgment signed by all the proprietors, set forth "that they have laid off the within lands into blocks and lots and public squares as platted above," and L. had always treated said square as belonging to the public after the acceptance of the plat by the town authorities. In a suit in equity by L. claiming the title to said square, and seeking to quiet his title, *held*, that his acts amounted to a dedication and he was estopped thereby from claiming title to the square. Livermore v. City of Maquoketa, p. 358.

Railroad Lands—Construction of Grants.—By act of Congress of May 15, 1856, public lands were granted to the state of Iowa, to be used in aid of the construction of certain railroads, and the state was thereby authorized to sell the first 120 sections before any portion of such roads were built. In July, 1856, the state by act of legislature granted said lands to the Iowa Central Air Line Railroad Company, and another railroad company, upon condition that if either should fail to complete and equip seventy-five miles of road within three years, thirty miles within the next year, and each year thereafter for five years, and the remainder on or before December 1, 1865, the state should resume all its rights to lands undisposed of, etc. The road mentioned by name accepted the grant, but failed to comply with the condition. Plaintiff was a contractor who received payment for work done on the road, in bonds and land scrip, which were afterwards surrendered, and a deed made by the railroad company to him of 120 sections of such lands, in payment of his claim. The railroad company having failed to comply with the condition of the grant, the legistature, by act of March 17, 1860, declared its rights forfeited, and resumed by the state, and by act of March 26, 1860, granted the same to the Cedar Rapids and Missouri River Railroad Company, defendant, with a saving clause that "in no event shall said company have any claim or recourse on the state for any defect in the title or conveyance of said lands." *Held*, that the act of the legislature granting the lands to the first named company, conferred the same authority as to the sale of 120 sections before any portion of the road was built, which was conferred on the state by the act of Congress, and that, therefore, the transfer of said company to plaintiff of said 120 sections was good, and the deeds passed a good title to the lands. As to the remainder of the lands, the sale thereof was restricted, conditioned upon the completion of certain portions of the road.

Miller, J., dissented, referring to Cedar Rapids & Missouri R. R. Co. v. Carroll County, for his views of the proper construction of the act of Congress. This case, it is stated, was announced in the same term but is not found in the present volume.

Courtwright v. Cedar Rapids & Missouri River R. R. Co., p. 386.

Homestead—What Constitutes.—Defendants removed and shipped their goods to D. with the intention of entering and residing on premises purchased by them there, which were undergoing repairs. The repairs being incomplete on their arrival, most of their goods were placed on the premises, and they repaired to a hotel temporarily to await such completion. *Held*, that the homestead right attached to the premises from the time of the storage of the goods there, and were exempt from liability for a debt contracted thereafter and before the actual occupation of the premises by the family. The court cited, in suppost of this exception to the rule, that the premises claimed must be occupied as a home, the following: Tyffe v. Beers, 18 Iowa, 4. when an absence from the premises for five years was held not to divest them of the homestead character, the *animus revertendi* being shown. Williams v. Swetland, 10 Iowa, 51, where W. deeded the premises he occupied with his house keeper to G., stating that he did not expect to remain, or hold the premises as a homestead, as his family did not wish to come there to live from a distant state, where they had a home. Afterwards the family came, and W. sued to recover the premises, on the ground that he occupied the same as a homestead when the deed was made, and his wife did not join in the deed. *Held*, that it was a homestead, and the conveyance passed no title. Neal v Coe, p. 407.

Costs in Criminal Cases—Effect of Pardon.—A general pardon does not operate to relieve a convict from a judgment for costs. Citing County of Schuylkill v. Rafsnider, 46 Penn. St. 446; State v. McO'Blenis, 21 Mo. 272; Holliday v. The People, 5 Gill. 214; State v. Farley, 8 Blackf. 229; *Ex parte* McDonald, 2 Whart 440. Estep v. Lacy, p. 419.

Injunction Bond—Measure of Damages.—The loss of time caused by the injunction at the usual rate of wages, provided diligence was used to secure other employment, *held* to be the proper measure of damages for the wrongful suing out of an injunction against working in a certain mine. Muller v. Fern, p. 420.

Evidence—Testimony of Experts—Medical Works.—The statute making works of science admissible does not make inadmissible other evidence of the same tendency, which was admissible before the statute. Such works are not the best or only evidence as to a difference in the mode of treatment in a particular case. Experts are competent to testify as to such difference, and as to who are standard authors and as to their several modes of treatment. Citing State v. Hinkle, 6 Iowa, 380, 386; McKivitt v. Cone., 30 Id. 456. Broadhead v. Wiltse, p. 429.

Promissory Note—Agreement not to Negotiate.—An agreement not to sell or dispose of a promissory note, although written with an endorsement on the back of the note, does not destroy its negotiability in the hands of a subsequent holder who acquired it subject to defences existing against it, of which he had notice. Citing Gage v. Sharp, 24 Iowa, 15; Lake v. Reed, 29 Id. 258. Leland v. Parriott, Adm'r, p. 454.

Divorce—Defences.—It is no defence to an action for divorce on the ground of adultery and desertion, that the wife knew of the adulterous acts, and continued to live with the husband, and affording opportunity though without design or connivance for such acts. Cochran v. Cochran, p. 477.

Attorney and Client—Compensation.—When attorneys are employed to go out of the state to render professional services, their compensation will be governed by the value of such services in this state, rather than the value in the state where the services were performed. Stanberry, Gibson & Stanberry v. Dickerson, p. 493.

Municipal Corporation—Liability for Negligence of Agents.—A city is not liable for the negligence of its officers or agents in executing sanitary regulations, adopted for the prevention of contagious diseases, or in the custody of persons afflicted with such disease, or the premises where such persons are kept. Plaintiff was called in passing, to aid the agents of the city in removing corpse of one who had died of small-pox, not being notified of the nature of the disease, and was stricken therewith, and having communicated it to his children, who died, sues for damages. *Held*, that he could not recover.

The city, in the exercise of its powers, to adopt and enforce police regulations, acts as a *quasi* sovereignity, and cannot be held responsible for neglect or non-feasance of its officers or agents. Citing Wheeler v. City of Cincinnati, 19 Ohio St. 19; Burkmeyer v. City of Evansville, 29 Ind. 187; Western College of Medicine v. City of Cleveland, 11 Ohio St. 375. Ogg v. City of Lansing, p. 495.

Party Wall—Rights of Adjacent Owner.—The statute confers the right to erect party-walls, but in the exercise of this right does not permit the uses of the wall for purposes foreign to a wall in common, nor the injury of its capacity as such. Citing Wood v. Copper Miners' Co., 14 C. B. 428, cited in Washb. Easm. 466, note 1. Although the wall, if erected at the sole cost of the first builder, will belong to him (Thompson v. Curtis, 28 Iowa, 229), he will have no greater right in its use than as a wall in common. Citing Wendell v. Delano, 7 Metc. 176. Sullivan v. Graffort, p. 531.

Easement—Incident to Right of Way.—Damnum Absque Injuria.—The grant of a "right of way over and through the land, for all purposes connected with the construction, use and occupation of its railway," conferred the right to dig wells thereon, although injury to a spring on the grantor's land resulted. Citing 2 Am. L. Reg. (N. S.) 65, and cases referred to; Swett v. Cutts, 11 Am. L. Reg. (N. S.) 11, and note thereto. Hougan v. Milwaukee & St. Paul Railroad Co., p. 558.

Nuisance—Mill-Dam Causing Overflow.—A mill-dam erected across an unnavigable stream, if so erected or managed as to cause injury to neighbors or become prejudicial to their health or comfort, thereby becomes a nuisance. Citing Commonwealth v. Clark, 1 A. K. Marsh. 323; Douglas v. The State, 4 Wis. 387; Eames v. New Eng. Worst. Co., 11 Metc. 570; The State v. Gainer, 3 Humph. 39; The People v. Townsend, 3 Hill, 479; Leming v. The State, 1 Chand. 178; Stoughton v. The State, 5 Wis 295; The State v. Close, p. 570.

Insurance—Non-Payment of Premium.—A stipulation in a policy to the effect that no insurance shall be considered as binding until the actual premium is paid in cash by note, and that the company shall not be liable for any loss or damage occuring when such note or any part thereof is past due and unpaid, is valid and binding, and no recovery can be had for a loss under such policy, unless its terms are complied with. Citing Keenan v. The Missouri State Mutual Ins. Co., 12 Iowa, 126 (i. e. 134); Williams v. The Albany Ins. Co., 10 Mich 451; S. C. 2 Am. Rep. 95; Watrous v. The Mississippi Valley Ins Co., p. 582. C. A. C.

Legal News and Notes.

—MR. FIELD, Q. C, is to be raised to the bench to fill the vacancy caused by the retirement of Mr. Justice Keating.

—HON. CHARLES MATTESON, has been elected associate justice of the Supreme Court of Rhode Island, to fill the vacancy caused by the promotion of Judge Durfee.

—A BILL to abolish "treating," has been introduced into the Illinois legislature. It provides that any man found guilty of asking another man to drink any intoxicating liquor, shall be find not less than $20 nor more than $100.

—DELAWARE has a parliamentum indoctum; and some future Lord Coke will no doubt have the privilege of exclaiming, "never a good law was made thereat." The Washington Chronicle notices the subject this wise: "The press of Delaware is boasting that there is not a solitary lawyer in the present legislature. No one supposed there was. The public whipping-post, however, still exists."

—A BILL has been introduced in Congress, providing that iron drop-boxes are to be placed in every institution where disordered minds are treated, to which the patients are to have free accesss. The supposition is that this arrangement will enable the patients of such institutions to correspond freely with the outside world, and that the public will thereby gain a deeper insight into the treatment to which they are subjected.

—A SINGULAR case has been recently brought to trial in one of the courts of New York city. Jennie Youngs, 23 years old, was recently married to Daniel S. Youngs, a widower of fifty-eight, he telling her at the time that he owned $150,000 worth of real estate in this city. Three days before the wedding she had the necessary enquires made, and ascertained the statement to be correct. Subsequent to the marriage she ascertained, as she alleges, that just before marrying her, Mr. Youngs conveyed all his property to his two daughters by his former wife. She brings suit to set aside that conveyance as a fraud on her, depriving her of her inchoate right of dower. The two daughters are also made defendants in the suit. The question of the right to maintain such an action had not, at last accounts, been determined by the court.

—HENRY G. FREEMAN, a distinguished member of the Pennsylvania bar, died in Philadelphia, on Sunday the 14th inst., in the eighty-sixth year of his age. He was admitted to the practice of the legal profession in the year 1809, and was at the time of his descease the oldest member of the Philadelphia bar, excepting Horace Binney. Mr. Freeman was widely known and universally respected for his talents and courtesy. His son, Hon Chapman Freeman, is member elect to Congress from the first district of Pennsylvania. He retired from the profession which he had distinguished, having accumulated a fortune. He was connected as director with the Insurance Company of the State of Pennsylvania, Girard Trust and Safe Deposit Company, Southwark Bank and many other business corporations. He was a well-known Mason. In early life he engaged actively in politics. He was ill but a short time, retaining his faculties until the last.—[*N. Y. Herald*.

—THE Albany Law Journal, speaking of the court of arbitration recently established in New York City, for the determination of commercial questions, says: "Tribunals of arbitration were also early established in France; and the French Tribunal of Commerce has virtually existed ever since 1563. In Germany a congress of jurists assembled in 1864, and declared that the Court of Arbitratition of Hamburg was the best because it introduced the legal element in the person of the presiding judge. In Denmark the 'Court of Reconciliation' has existed since 1795. Tribunals of abitration for the settlement of commercial disputes, now exists in France, Germany, Russia, Austria, Spain, Italy, Belgium, Denmark, and it may be said throughout Europe. The New York Court of Arbitration is the outcome of the same conditions which necessitated the European tribunals of like character; it is the result of demands for a more prompt, simple and cheap method of disposing of disputes than can be afforded by the ordinary courts of law."

—EARNINGS OF THE GREAT LIGHTS OF THE LAW—A London correspondent writes as follows: The death of Lord St. Leonards, at the age of ninety-four, would seem to speak favorably of the healthfulness of judicial work. When at the height of his practice at the bar, he made from £15,000 to £20,000 a year, which was, of course, worth more than now. Kenyon is said never to have earned more in a year than £11,000, and Eldon £12,000 and little over. In more recent days, Lord Westbury, Lord Cairns and Lord Selborne (Sir R. Palmer) are believed to have received in fees from £20,000 to £30,000 annually during their last few years at the bar. Mr. Charles Austin, who died the other day, and who in the period of the railway mania, was leader of the paliamentary bar, was for a number of years supposed to be making an almost fabulous income—some say as much as £100,000 a year. Mr. Sergeant Ballentine has just gone to India to defend the Guicowar of Barowda, who is to be tried on a charge of poisoning. His retainer was £5,000 down, and it is understood that, on the assumption that he will be away three months, he will receive another £5,000 in refreshers. In the meantime, however, his practice will be taken up by other men, and may not be recovered.

—THE Law Times, alluding to the eulogistic address of the solicitor-general of England, on the occasion of the retirement of Mr. Justice Keating, says: "It is much to be feared that we have fallen upon times as barren of high judicial capacity and brilliant forensic talent as of parliamentary debating power and statesmanship; and when we see the ornaments of the bench passing away before our eyes, like blazing meteors gradually going out and leaving the heavens in thick darkness, sincere and keen regret must be felt and must be expressed. The occasion is said to bring fourth the man, and there may be fine talents now lying undiscovered in the ranks of the bar; but we cannot be blind to the fact that at present there is no promise of compensation for the retirement of such lawyers as Mr. Justice Keating. That learned judge belonged to an epoch in the history of the court of common pleas, which is red-lettered in the legal calendar. Can we point to any tribunal of modern time more admirably endowed than this court, when Sir William Erle was its president, and his puisnes were the profound and versatile Willes, the sound, practical and discriminating Sir Barnard Byles, the accomplished and able judge, whose retirement we now deplore, and Sir Montague Smith, whose talents have raised him to one of the two tribunals of last resort in the empire? Very able men now sit in the places occupied by those we have named, but we are sure that they would be the first to admit that the standard of their predecessors is high and hard to reach."